AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. IX DECEMBER, 1923 NO. 12

Executive Committee to Meet at Philadelphia on Monday, January 14

THE Mid-Winter Meeting of the Executive Committee of the Association will be held at Philadelphia, Pennsylvania, at the Bellevue-Stratford Hotel, beginning January 14, at 10 o'clock. It was announced in the November Journal that the meeting would be held at Washington, beginning January 15, but various considerations induced President Saner to change the place and date. The principal of these was that he was informed that there would be an unusual number of committee hearings at Washington, in connection with the present session of Congress, about the time originally set for holding the mid-winter meeting, and this promised to make the matter of hotel accommodations more difficult than was anticipated. A cordial invitation to hold the mid-winter meeting of the Executive Committee at Philadelphia having been received, it was decided to accept it. New York, Philadelphia and Atlantic City have already expressed a desire to entertain the next annual meeting of the American Bar Association, and the change of place will make it convenient for representatives of those cities to appear and present their invitations to the Executive Committee.

The Association of the Bar of the City of New York, on learning that the mid-winter meeting of the Executive Committee would be held in the East, extended an invitation to the members of that body to be its guests of honor at a dinner to be given on a date most convenient to them. This courteous invitation was transmitted to the members of the Executive Committee by President Saner and accepted, and the evening of January 12 has been set for the affair. The dinner will be given in the house of the Association, No. 42 W. 44th Street, New York City, at 7:30 in the evening.

For an Index of Current Legislation

THE American Association of Law Libraries, through a committee of which Luther E. Hewitt, librarian of the Law Association of Philadelphia, is chairman, is making an effort to secure the preparation of an index of the current laws of the respective states and of Congress on matters of general public interest, with provision for its publication at intervals at a moderate price. A request by the Association that the Library of Congress undertake the work has been submitted to Dr. Herbert Putnam, librarian of the Library of Congress. While the execution of this plan would doubtless require a congressional appropriation, yet it is believed that this would be insignificant in comparison with the usefulness of such a publication. For a number of years before 1909 the New York State Library at Albany published an annual index of legislation, and supplemented it by an annual review of governors' messages and an annual critical review of legislation in various fields. The index of legislation as published by the New York State Library ran several hundred pages in the odd years when most of the legislatures were in session. The review of governor's messages and the critical review of legislation made smaller pamphlets. This work was discontinued as the result of a fire which destroyed the files of the New York State Library, and also destroyed a good deal of material that was ready in manuscrips for publication.

International Commission of Jurists

GUATEMALA, Panama and the United States have notified the Pan-American Union of the names of their representatives on the international Commission of Jurists, in accordance with the provisions of a resolution adopted by the Fifth International Conference of American States, held at Santiago, Chile in March and April last. Dr. James Brown Scott and Prof. Jesse F. Reeves will represent the United States, while Don Antonio Battres and Dr.

José Martos will represent Guatamala, and Dr. Eusebio A. Morales and Dr. Horacio F. Alfaro will represent Panama. The Commission is to meet at Rio de Janeiro in 1925, at a date to be later determined. It was originally created by the Third International Conference of American States, which adopted a convention providing for an international commission of jurists to prepare a draft of a code of private international law and one of public international law. This commission met at Rio de Janeiro in 1912 and organized various committees, but subsequent circumstances, among which were the World War, curtailed its activities. The Santiago conference in the early part of the present year adopted a resolution reorganizing the commission, with the object of continuing the work started in 1912. It also entrusted it with a number of additional functions, among them consideration of the status of children of foreigners born within the jurisdiction of any of the American republics; the rights of aliens resident within the jurisdiction of any of these republics; and the study of the project submitted by the Costa Rican delegation to the Fifth International Conference for the creation of a permanent American Court of Justice. The resolutions of the commission will be submitted to the Sixth International Conference of American States, which will meet at Havana, Cuba.

Additional Law Schools in Class B

UPON information received since the publication of the list of approved Law Schools in the November number of the JOURNAL, the Council on Legal Education and Admissions to the Bar finds that the following schools are also to be classified in Class B, as schools which have announced their intention of meeting the American Bar Association standards in the near future:

The Catholic University of America, The School of Law, Washington, D. C.

Vanderbilt University, The Law School, Nashville, Tennessee.

JOHN B. SANBORN, Secretary.

The Peace Award Referendum

IT is announced that 22,165 plans were submitted in the competition for the American Peace Award, created by Edward W. Bok, and offering $100,000 for the "best practicable plan by which the United States may cooperate with other nations to achieve and preserve the peace of the world." The jury of award, consisting of Elihu Root, chairman; Gen. James Guthrie Harbord, Col. Edward M. House, Ellen F. Pendleton, Roscoe Pound, William Allen White and Brand Whitlock, expects to select the winning plan by January 1, 1924. The policy committee, of which Hon. John W. Davis is chairman, now announces that it will present this plan to the American people for their consideration by means of a referendum to be conducted through the press, through the cooperating council of the American Peace Award, through mayor's committees in many communities, through the universities and libraries of the country, and through local organizations of all kinds. It is announced that organizations whose combined memberships total many millions have already agreed to submit a copy of the plan and a ballot to their members, and the press of the country is generally cooperating in the attempt to secure a wide expression of opinion. The committee properly emphasizes the need of securing not a great volume of ballots representing the hasty, unconsidered action of the voters, but the real opinion of the voters after they have carefully read the plan or a digest of it. The Journal feels that its readers will be interested in seeing the plan in this publication and in having an opportunity to express an opinion thereon, and it has therefore decided to carry in a future issue a copy or digest of it and also a ballot upon which may be expressed approval or disapproval of the plan in substance.

Putting Law Into the "Doctor of Law"

THE report of the President of Columbia University for 1923 states that the statutes of that institution have now been amended to provide for the institution of the degree of Doctor of Law (Doctor Juris), to be conferred upon the completion of advanced work and research in the field of public and private law, on substantially the same terms and conditions as the degree of Doctor of Philosophy is now awarded to mark the completion of advanced work in other fields of endeavor. This decision was only reached after a consideration of the matter which extended over many years. It was very strongly felt, we are told, that no support should be given by Columbia University to the movement to multiply degrees, including advanced degrees of every sort and kind, and it was urged that if the degree of Doctor of Law should be instituted, no logical objection could be interposed to the later establishment of the degree of Doctor in architecture, in business, in education, etc. However, a solution of this problem was found in a formal declaration by the trustees that it was determined and declared to be the definite policy of Columbia University to confine the degree of "doctor," when given in course to reward the completion of advanced instruction and research, to the four traditional academic groups and the four historic university faculties of law, medicine, theology and philosophy. While the degree of doctor is widely given in the field of law in Europe, both in Great Britain and in the United States it has long been chiefly used as an honorary distinction. In the field of theology the degree of "doctor" in this country has also become almost exclusively honorary, while in the field of medicine, to quote from the report, "the degree of doctor has most unfortunately been assimilated to and confused with that of bachelor and is everywhere in the United States given on the completion of an undergraduate professional course in medicine and surgery."

THE MYSTERIOUS MASSACHUSETTS TRUSTS

Legal History Involved in Determining Their Character—With Exception of a Few Which Are Trusteeships, They Are on the Whole Simply the Old Common Law Unincorporated Business Associations, Occupying Position Midway Between Corporations and Partnerships—Points of Resemblance

By WILLIAM W. COOK
Of the New York City Bar

VERY much the same question is asked of the Massachusetts Trusts as was asked of Ulysses some three thousand years ago. "Who art thou of the sons of men; and whence?" The answer involves some legal history.

Unincorporated associations have existed for centuries in England and have grown up with corporations and partnerships. They are really an offshoot from both.

A partnership agreement may be framed in any way the partners wish and it was easy to borrow from corporations the idea of shares and the transferability of the same without dissolving the partnership. As a result unincorporated associations became a class by themselves. They differ from a *partnership* in that, as the supreme court of Illinois says: "The transferability of the shares makes such an association different, not merely in magnitude but in other ways, from ordinary partnerships, because the association is not based upon mutual trust and confidence in the skill, knowledge and integrity of the other partners. The sale of shares by a member, the shares being transferable, is not a dissolution and the death of a member is not a dissolution".[1] They differ from a *corporation* in that they have no charters and cannot sue or be sued or hold title to real estate in the association's name, and the shareholders are liable for the debts.

At first they were denounced by the English courts as illegal in having transferable shares of stock,[2] but Judge Lindley says,[3] "an unincorporated company with transferable shares will not be held illegal at common law unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established."

They are of two kinds, those not for profit and those for profit. Those not for profit include many social, benevolent and mutual aid organizations; clubs (now generally incorporated); exchanges and building associations. As a rule the members are not liable for the debts, the relation being one of agency and not partnership. For instance, the members of a pilot association are not liable for the negligence of one of their number;[4] nor the members of a club for its debts,[5] nor the members of a political organization for its obligations except those necessary to preserve its existence.[6] An unincorporated union may be sued as an entity for its torts.[7] These non-profit associations, however, are not the subject of this article.

Associations for profit (of which "Massachusetts Trusts" are a species, as will be shown later) have a great variety of articles of association, prescribing their objects, procedure, officers, rights of members, etc. In different jurisdictions they have developed in different ways, particularly in England, New York and Massachusetts, and it will add clearness to describe briefly their history in those three jurisdictions.

In England they led a stormy existence. They were denounced for issuing transferable shares, thereby usurping a corporate franchise, and because they engaged in floating speculative and fraudulent projects, and because they could not be sued without all the members being joined as defendants. Accordingly in 1719,[8] the Bubble Act declared them to be public nuisances and their acts were declared to "for ever be deemed to be illegal and void." That Act is said to have been passed at the instance of the South Sea Company, the biggest bubble of them all. The Act soon became a dead letter and the trading associations kept on growing. They were preferred to a corporation by the English because if the adventurers "applied to the Crown for a charter, and succeeded, it became a corporation, and the members were rendered irresponsible for its debts. What was wanted for trade was a society, which might sue and be sued like a corporation, while its members remained personally liable for its debts."[9] This probably was to obtain credit and was accomplished by the Act of 1825.[10] In the same year the Bubble Act was repealed. In 1854 an English court said: "These Companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed to it."[11] In 1862, however, a more drastic law was enacted and all such companies or associations were and still are prohibited absolutely in England by Act of Parliament,[12] where the "company, association, or partnership" consists of more than twenty persons formed for the purpose of carrying on business and are not registered. Then arose the question of what constituted carrying on business and in the celebrated case, Smith v. Anderson, in 1880,[13] the court held that the prohibition applied to an organization for performing a succession of acts

1. Horsack v. Ottawa Development Assoc., 244 Ill., 274, 291, 292 (1910).
2. See People v. Wemple, 117 N. Y. 136 (1889), at pp. 144, 145.
3. Company Law, 5th ed., p. 132. See also Phillips v. Blatchford, 137 Mass. 510 (1884) where Judge Oliver Wendell Holmes, Jr. (now of the supreme court of the United States) said: "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. They have been recognized as lawful by the court, from Alvord v. Smith, 5 Pick. 232, to Gleason v. McKay, 134 Mass. 419. Even if the question were a new one, we should come to the same result. The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times."
4. Guy v. Donald, 203 U. S. 399 (1906).
5. Wise v. Perpetual, etc., Co. (1903) A. C. 139.
6. Siff v. Forbes, 135 N. Y. App. Div. 39 (1909).
7. United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922).
8. 6 Geo. I, c. 18.
9. Ency. Brit., 9th Ed., Vol. VI, p. 221, under "Company." See also Lindley on Companies, 6th Ed., Introductory, pp. 3, 4.
10. 6 Geo. IV, c. 91, § 2.
11. Greenwood's Case, 3 De G. M. & G., 459, 477 (1854).
12. 25 and 26 Vict. c. 89, §§ 1 (2), 4, re-enacted in 1908, see 8 Edw. 7, c. 69.
13. (1880) 15 Ch. D. 247, overruling Sykes v. Beadon (1879), 11 Ch. D. 170.

but not of one act, and hence more than twenty persons might subscribe to a fund to be invested in the shares of companies by trustees for the subscribers. Here we find the origin of the division of these unincorporated associations into two classes, one called partnerships, the other trusteeships. The lower court (an able one, Jessel as Master of the Rolls) was reversed and a prior decision overruled. Subsequent English decisions doubted the correctness of Smith v. Anderson but it is still law.[14] In that case Lord Justice Brett said the shareholders "were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not for the purpose of obtaining gain from a repetition of investments." The court also held that the shareholders did not transact the business of investing. "It was not their business" but was that of the trustees, who were "clearly trustees as distinguished from agents and from directors." It will be noticed that here are two distinct grounds for deciding that organization to be a trusteeship—(1) investment; (2) the shareholders did not control. In England the unregistered common law associations have disappeared by reason of the statute mentioned above, but the investment trusteeships still thrive, as shown in the note below.[15]

In New York unincorporated associations formerly flourished but they withered under taxation and regulating statutes. The shareholders remained liable for the debts. The federal courts declined jurisdiction of suits in their name, and there were not enough advantages to offset all this. As early as 1849 they were authorized to sue and be sued in the name of the president and treasurer. They were called "Joint Stock Companies and Associations".[16] In 1854 the courts were given power to dissolve them for fraud "or other good cause." The act declared it gave them no corporate rights.[17] In 1867 they were authorized to hold real estate in the name of the president.[18] In this statute they were still called "joint-stock companies and associations." In 1885 and 1894 the "Joint-Stock Association Law" included "every unincorporated joint-stock association, company or enterprise" having a "capital stock divided into shares," exclusive of corporations. The shareholders were called stockholders. The articles of association were to provide for three or more directors "to have the sole management of its affairs." Every year a certificate must be filed with the secretary of state and county clerk by "every joint-stock association transacting business within this state," giving its name, date of organization, number of stockholders, names and residences of its officers and its principal place of business.[19] By the Code of Civil Procedure, if the members were seven or more, suits by or against the association might be in the name of the president or treasurer.[20] In 1920 these laws were combined and called the "General Associations Law".[21] Meantime during all this period the New York courts have been quite mystified as to whether these associations were to be considered corporations or partnerships, in the application of statutes and the common law. The court of appeals says that they are partnerships "with some of the powers of a corporation".[22] They are taxed as corporations.[23]. The courts of other states in passing on them have varied in their decisions.[24] However, it is clear that they are not full corporations and all of the decisions hold that the members are liable for the debts, like partners.[25] The federal courts refuse to recognize New York Joint-Stock Associations as entities in questions of jurisdiction,[26] but a New York express company is entity enough to be indicted for violating the Interstate Commerce Act.[27] Practically all of the great express companies were New York associations prior to 1918, in which year four of them[28] were consolidated into the American Railway Express Company, a Delaware corporation.[29] In the year 1922 only 28 associations filed their annual statements with the Secretary of State at Albany, while 18,227 corporations filed their certificates of incorporation.[30]. Evidently New York unincorporated associations have died from too much legislative attention.

Pennsylvania has very similar common law associations with statutory powers, called "Limited Partnership Associations," but the shareholders are not liable for the debts.[31]

The Michigan statute calls them "Partnership Associations Limited" and there is a limited liability. In most respects they are treated as corporations but not necessarily so as to taxation.[32]

Somewhat similar indefinable statutory organizations are found in other states.

In Massachusetts unincorporated associations have existed for over a century and it is there that the jurisprudence on this subject has been more completely worked out (hence the term "Massachusetts Trusts"), but it was not until 1890 (ten years after the decision in Smith v. Anderson) that they were divided into two classes: associations and trusteeships.[33] If Massachu-

14. See Williams v. Milton, 215 Mass. 1, 9, 10 (1913) where the court says: "The decision in Smith v. Anderson is the law of England today, although by reason of some special facts in that case and the way in which the question arose doubts as to the conclusion reached in that case have been thrown out by two or three individual judges. For the subsequent cases see Crowther v. Thorley, 32 W. R. 330; In re Siddall, 29 Ch. D. 1; In re Jones, 1898, 2 Ch. 83, 91. For two cases where the distinction between managing agents who hold the legal title and trustees properly so called is reaffirmed, see In re Thomas, 14 Q. B. D. 379, 383; In re Faure Electric Accumulator Co., 40 Ch. D. 141, 151, 152."

15. In an article published in London in 1919, the following appears:

"These investment trusts work on the insurance company plan, selecting securities from all parts of the world. The Investment Trust Corporation, Ltd., of London, for instance, shows in its statement for 1917 not less than 315 kinds of investments; the Second Edinburgh Investment Trust, Ltd., of Edinburgh, Scotland, 338, and the Metropolitan Trust Company, Ltd., of London, 220. These investments include foreign government issues, municipal loans, mortgage bonds, preferred and common shares in railroads, public utilities, banking, commercial and industrial corporations.

"The Continental investment companies show a less large variety in the class of their investments. They have adopted the specialization method, of which the Trust for Metal Securities, in Basle, Switzerland; the Trust for Rubber Securities, in Antwerp, Belgium, and the Trust for Electrical Enterprises, in Berlin, are examples. These had given satisfactory results up to 1913, the last year for which data is available."

16. L. 1849, ch. 258.
17. L. 1854, ch. 245.
18. L. 1867, ch. 280.
19. L. 1885, ch. 505. L. 1894, ch. 235.
20. §§ 1919, 1920. There were also other provisions of the Code applicable to them. See §§ 1809, 1813, 1921, 1922, 1923.
21. L. 1920, ch. 915.
22. People v. Coleman, 133 N. Y. 279, 287 (1892). See also Re Willmer's Estate, 138 N. Y. Supp. 649 (1912).
23. People v. Wemple, 117 N. Y. 136 (1889).
24. See Wrightington on Unincorporated Associations, 2nd Ed. (1923), pp. 14-19.
25. See cases cited below.
26. Chapman v. Barney, 129 U. S. 677 (1889); to same effect Great, etc., Co. v. Jones, 177 U. S. 449 (1900) as to Pennsylvania "Limited Partnerships."
27. United States v. Adams Express Co., 229 U. S. 381 (1913).
28. Adams Express Company; American Express Company; Southern Express Company, and Wells Fargo & Company.
29. The consolidation was approved by the Interstate Commerce Commission under 41 U. S. Stat. 482, § 407, sub-division 7. The consolidation is explained in Gibson v. American Railway Express Co., 193 N. W. 274 (Iowa, 1923), referring to American Railway Express Co. v. Commonwealth, 190 Ky. 636; American Railway Express Co. v. Downing, 132 Va. 139 and McAlister v. American Railway Express Co., 179 N. C. 556.
30. For this information I am indebted to F. S. Sharp, Examiner of Corporations, in the office of Hon. James A. Hamilton, Secretary of State at Albany, N. Y.
31. Whitney v. Backus, 149 Pa. St. 29 (1892). Romona, etc., Co. v. Bolger, 179 Fed. 979 (1910).
32. Whitney Realty Co. v. Deland, 189 N. W. 1007 (Mich., 1922).
33. Mayo v. Moritz, 151 Mass. 481 (1890). In Cook v. Gray, 133 Mass. 106 (1882) it was held that contracts entered into by the trustees of a trust deed for many shareholders bind the latter but not the former personally, where the trustees were authorized to make the contracts and did so as trustees.

setts had insisted on the double test of trusteeships, namely, control and strict investment, the trusteeships would have been very few in number and there would have been no occasion for the United States Circuit Court of Appeals in 1922 saying, "We are not called upon to deal with the confusing and perhaps irreconcilable decisions in the Massachusetts courts concerning the nature and legal incidents of these associations."[34] Judge Anderson might have added that the lower federal courts also have not been particularly harmonious or illuminating on this subject and that we have yet to see what basis the Supreme Court of the United States adopts for separating associations from trusteeships. Meantime the temptation is to draw organization instruments so as to give the entire control, management, powers, etc., to the trustees, in order to make them trusteeships instead of associations.[35] The shareholders care little, because in nearly all large organizations, corporate or otherwise, they have little to say anyway and merely send in their proxies.

To summarize, these *trusteeships* have been made a separate class from *associations* and they are now firmly established in the jurisprudence of England and Massachusetts and have been recognized by the Supreme Court of the United States. The line of demarkation, however, between associations and trusteeships is still indistinct and might better be the double test of control *and* investment, especially the latter, being the difference between active and passive business; the trader and the investor; the profit seeker and the income consumer. The line based on division of control alone is illogical and prolific of litigation. It leads to self perpetuating trustees, which is dangerous, except in eleemosynary institutions. The whole tendency and policy of the law is to make directors responsive to the shareholders' will. To be sure Mr. Justice Holmes in Crocker v. Malley[36] refers to the orthodox Massachusetts view that if the shareholders have little or no control, direct or indirect, this indicates a trusteeship, but, as in Smith v. Anderson, he points out that the organization involved in that case was for investment purposes.

Possibly the Supreme Court may confine trusteeships to declarations of trust where shareholders have no control and the business is investment—both characteristics to exist, one being insufficient. By that double test nearly all of these Massachusetts Trusts are not trusteeships but associations. As to how much control by the shareholders creates an association and how little a trusteeship the decisions are somewhat vague and confusing. Thus the consent of the shareholders to changing the trust agreement after being first proposed by the trustees or of terminating it, is not such control by the shareholders as to create an association, the business being investment.[37] But where the shareholders may remove the trustees and elect others, and amend the trust instrument or terminate it, an association exists.[38]. So also where the shareholders elect the trustees and may amend and terminate,[39] or where the shareholders' consent is necessary to any sale of the property, with provisions for annual meetings and power to remove trustees and fill their places.[40] In Crocker v. Malley,[41] no meeting of the shareholders was provided for, but their consent to amending the trust instrument or filling a vacancy among the trustees was required. It was for investment purposes and was held to be a trusteeship. A lower federal court points out that in this last decision the trustees did not carry on a business, and that the rule is otherwise where the shareholders meet annually and elect trustees and have power to terminate the trust agreement.[42] In Smith v. Anderson,[43] the leading case on this subject, the shareholders had no power except to fill vacancies among the trustees and the purpose was investment. Much learning and many metaphysical and technical distinctions, in which the fine Massachusetts mind luxuriates, have been brought to bear on this subject,[44] but the following seems to be the net result.

(1) Trusteeships under a last will and testament throw little light on the subject, because even though the trustees continue or carry on a business they are not partners.[45] The beneficiaries are not liable for the debts,[46], except to indemnify the trustee,[47] but the trustees are liable,[48] and under certain circumstances the funds engaged in business may be reached, and even the trust funds not involved in the business.[49] The trustees have recourse to the estate, but authority to continue a business gives no authority to invest other trust funds in the business.[50] Such trusteeships differ from Massachusetts Trusts in that the beneficiaries have nothing to do with the creation of the trust and may in fact decline to accept its benefits. They are not the moving parties as in a Massachusetts Trust but the courts are applying more or less to these business trusteeships the principles governing the continuation of the business of a deceased person.

(2) A Massachusetts Trust controlled by its shareholders, whether for purely investment purposes or for "carrying on" business, is a partnership so far as the liability of its beneficiaries, i. e., its shareholders, is concerned. It is not a partnership under the federal tax laws but is taxed under those acts like a corporation. Its shareholders may of course be taxed as partners under the particular wording of state tax laws.

(3) Where the shareholders do not control and there is no "carrying on" of business but merely an investment, the organization is a trusteeship and not an association; in other words not a partnership. What constitutes "carrying on" business is fairly well determined. Since Smith v. Anderson, the buying and holding of stocks as an investment, even though varied from time to time (but not varied for profits in dealing) is not carrying on business. Neither is the purchasing, holding and renting of one or a few pieces of

34. Malley v. Howard, 281 Fed. 368, 371 (1922). An appeal in this case was argued in the Supreme Court of the United States on May 3, 1923, but the decision has not yet been handed down.

35. For an illustration, see Betts v. Hackathorn, 252 S. W. 602 (Ark. 1923). An appeal in a case Crocker v. Malley was argued in the Supreme Court of the U. S. on May 3, 1923, but the decision has not yet been handed down.

36. 249 U. S. 223 (1919).

37. Williams v. Milton, 215 Mass. 1 (1913).

38. Frost v. Thompson, 219 Mass. 360 (1914). Under articles of association for business purposes where the shareholders may terminate the organization at any time, the business being to make profits and it being controlled by its members, the members are liable for its debts, even though the articles provide against liability of the trustee, shareholders and officers. Rand v. Morse, 289 Fed. 339 (1923)—a case arising in Missouri.

39. Dana v. Treasurer, 227 Mass. 563 (1917).

40. Priestley v. Treasurer, 230 Mass 452 (1918).

41. 249 U. S. 223 (1919). An appeal in a case Crocker v. Malley was argued in the Supreme Court of the United States on May 3, 1923, but the decision has not yet been handed down.

42. Malley v. Bowditch, 259 Fed. 809 (1909).

43. 15 Ch. D. 247 (1880).

44. In one case Williams v. Johnson, 208 Mass. 544, 553 (1911) the court said that the trust before the court was a partnership. Two years later the same court said (Williams v. Milton, 215 Mass. 1—1913) that that was a mistake and that it was not a partnership. This is somewhat bewildering.

45. Perry on Trusts, 6th ed., p. 701, note. The trustees of the estate of a deceased partner in a partnership do not themselves become partners even though they allow the surviving partners to continue the business with certain payments to the estate. Holcombe v. Long, 139 N. E. 633 (Mass. 1923).

46. Perry, § 815b, p. 1340 note.

47. Perry, §§ 485, 486, pp. 791, 792.

48. Perry, § 437a, p. 700.

49. Perry, § 815b, p. 1338 note.

50. Perry, § 455, p. 731.

real estate. That certainly is "business" in one sense, but is not "carrying on" business.

(4) Any case which holds that an organization that does carry on an active business is a trusteeship and the shareholders are not liable for the debts, where such shareholders do not control, is wrong in principle.[51]

Those who do business in the names of others and take the profits are supposed to be liable as partners for the losses. When such individuals escape liability for the debts by the way they draw their instrument it comes pretty close to usurping the corporate franchise of exemption from liability and at any rate is an abuse. The trustees may not be responsible or if they are and have to pay and then seek contribution from the shareholders, they will be met by the defense that they should have contracted against liability or that they exceeded their authority, or other defense.

But why have Massachusetts Trusts become so prominent? The plain explanation is that they escape many of the exactions from corporations in the way of penal statutes, unnecessary reports, statutory liability of directors, multitudinous forms of taxation, restrictions on foreign corporations doing business in a state, and various other statutes evolved from the legislative mind. As the writer has stated elsewhere, the corporation is a useful beast of burden but there is a limit to the load.

On the other hand there are disadvantages. Perhaps the clearest way of treating the subject is to consider the items separately, comparing the corporation, the association, and the trusteeship.

Taxation is the most important. Corporations, as everybody knows, are subjected to all kinds of taxes. Referring to a few of them, an incorporating fee need not be paid by Massachusetts Trusts. License fees imposed by the usual state statute on foreign corporations for the privilege of doing business in the state do not generally apply to Massachusetts trusts;[52] nor capital stock taxes in all cases, nor franchise taxes. Stamp taxes on the issue of or transfer of shares apply to associations[53] but not to trusteeships. As to federal taxes the Supreme Court held in Eliot v. Freeman[54] and Zonne v. Minneapolis Syndicate[55] (real estate investment trusteeships) that they were not subject to the corporation license act of congress of 1909, and held in Crocker v. Malley[56] (another real estate and stock investment trusteeship) that the federal income tax law of 1913 did not apply to dividends received by the trustees and distributed by them among the shareholders, who paid an income tax thereon. On the other hand, the federal court of appeals has held that Massachusetts Trusts, which are mere associations, are subject to the federal tax on capital.[57]. In general, Massachusetts Trusts have decided advantages as to taxation, but if they become numerous and rich the tax legislator may safely be relied upon to reach them with the same uncanny skill with which he reaches corporations.

And there are disadvantages. The chief one is the liability of the shareholders for the debts.[58] The trustees are liable also.[59] By reason of this the trust instrument generally provides that neither the shareholders nor trustees shall be liable but that does not bind a creditor unless he agrees to it in his contract or actually knows about it.[60] In a trusteeship the shareholders are not liable but the trustees are, unless pro-

51. A very recent case in Arkansas holds that in an unincorporated organization where the shareholders have no control, there being no provision for their meeting at any time for any purpose, they are not liable to creditors but the trustees are liable as principals, even though the declaration of trust declares that they shall not be liable. This was held to be a common law trust and the court said it differed from a joint stock company in that in the latter the managers are agents of the shareholders. The business was an active one, the suit being to recover the price of goods sold and delivered. Betts v. Hackathorn, 253 S. W. 602 (Ark. 1923).

There is strong authority, however, to the contrary. The United States Express Company was organized in New York in 1854. It was unincorporated. It was involved in Spraker v. Platt, 168 N. Y. App. Div. 377 (1913) where it was held that a shareholder could not have mandamus for an election of trustees, even though there had been no meeting for 51 years, the trust agreement being that the board should be self-perpetuating unless two-thirds in interest of the shareholders made a written request for an election. The shareholders certainly had practically only nominal power in that organization for 51 years and yet no one considered it a trusteeship. If the amount of *control* by the shareholders in this express company had determined its character it would have been a trusteeship and the shareholders not liable. Yet even in Massachusetts these New York express companies are held to be associations and the shareholders liable as partners. Taft v. Ward, 106 Mass. 518 (1871), s. c. 111 Mass. 518 (1873); Bodwell v. Eastman, 106 Mass. 525 (1871); Gott v. Dinsmore, 111 Mass. 45 (1872); Boston etc. R. R. v. Pearson, 128 Mass. 445 (1880). This Sprakes case shows how shallow and illogical is the rule that liability depends on whether the shareholders do or do not have power to change the trustees. Self-perpetuating trustees is a poor test, especially when not applied even when the trustees have been self-perpetuating for 51 years and thereafter.

In the case Nini v. Cravens & Cage Co., 253 S. W. 582 (Tex. 1923), the court said that under the Texas statutes the shareholders are liable for the debts even though they have no direct control or authority over the trustees or the management of the business, there being no contract with the creditors to the contrary, although in that case the shareholders were to hold annual meetings to elect the trustees. The court summarized twelve Massachusetts decisions on this subject of control as affecting the character of the organization as follows:

"Williams v. Milton, 215 Mass. 1, 102 N. E. 355. Boston Personal Property Trust; no meetings of any sort were held by the shareholders. Trust.

"Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083. Development of patent; no meeting of shareholders. Trust.

"Hoadley v. Essex, 105 Mass. 519. Shoe repairing machine; meetings of shareholders to elect executive committee. Partnership.

"Gleason v. McKay, 134 Mass. 419. Same instrument as in Hoadley v. Esser. Partnership.

"Whitman v. Porter, 107 Mass. 522. Running ferry boat; meeting of shareholders. Partnership.

"Phillips v. Blatchford, 137 Mass. 510. Manufacturing business; meeting of shareholders. Partnership.

"Ricker v. American L. & T. Co., 140 Mass. 346, 5 N. E. 284. Car trust; meetings of shareholders. Partnership.

"Williams v. Boston, 208 Mass. 497, 94 N. E. 808. Development of realty; meetings of shareholders. Partnership.

"Frost v. Thompson, 210 Mass. 360, 106 N. E. 1009. Note of fruit company; meetings of shareholders. Partnership.

"Tyrrell v. Washburn, 88 Mass. (6 Allen) 466. General merchandise; meetings of members. Partnership.

"Priestley v. Burrill, 230 Mass. 452, 120 N. E. 100. Real estate trust; 'Trustees shall have entire control and management;' but the 'trustees may call meetings of shareholders.' Partnership.

"Dana v. Receiver General, 227 Mass. 562, 116 N. E. 941; Manufacturing; meeting of shareholders. Partnership."

52. In the case, however, of Oliver v. Liverpool, etc., Ins. Co., 100 Mass. 531 (1868); aff'd. *sub. nom* Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566 (1870), it was held that a Massachusetts statute imposing a license fee on foreign insurance companies "incorporated or associated" under the laws of foreign governments was applicable to an English unincorporated joint-stock association.

53. Malley v. Bowditch, 259 Fed. 809 (1909).

54. 220 U. S. 178 (1911).

55. 220 U. S. 187 (1911).

56. 249 U. S. 223 (1919). An appeal in a case Crocker v. Malley was argued in the Supreme Court of the United States on May 3, 1923, but the decision has not yet been handed down.

57. Malley v. Howard, 281 Fed. 263 (1922). An appeal in this case was argued in the Supreme Court of the United States on May 3, 1923, but the decision has not yet been handed down.

58. Tappan v. Bailey, 45 Mass. 529 (1842); Taft v. Ward, 106 Mass. 518 (1871); s. c., 111 Mass. 518 (1873); Bodwell v. Eastman, 106 Mass. 525 (1871); Whitman v. Porter, 107 Mass. 522 (1871). Gott v. Dinsmore, 111 Mass. 45 (1872) Machinists' Nat. Bank v. Dean, 124 Mass. 81 (1878); Boston, etc., R. R. v. Pearson, 128 Mass. 445 (1880); Cook v. Gray, 133 Mass. 106 (1882); Phillips v. Blatchford, 137 Mass. 510 (1884); Ashley v. Dowling, 203 Mass. 311 (1909); Neville v. Gifford, 136 N. E. 160 Mass. (1922); Wadsworth v. Duncan, 164 Ill. 360 (1896); McFadden v. Leeka, 48 Ohio St. 513 (1891); Jenne v. Matlack, 41 S. W. 11 Ky. (1897); Westcott v. Fargo, 61 N. Y. 542 (1875); Witherhead v. Allen, 3 Keyes, 562 (1867); Cross v. Jackson, 5 Hill, 478 (1843); Skinner v. Dayton, 19 Johns, 513 (1822); Wells v. Gates, 18 Barb., 554 (1854); Cutler v. Thomas, 25 Vt. 73 (1852) Kramer v. Arthurs, 7 Pa. St. 165 (1847); Newell v. Borden, 128 Mass. 31 (1879). *Contra*, Irvine v. Forbes, 11 Barb. 587 (1852); Livingston v. Lynch, 4 Johns. Ch. 573 (1820), overruled as dicta by Townsend v. Goewey, 19 Wend. 424 (1838) Allen v. Long, 80 Tex. 261 (1891); Ridenour v. Mayo, 40 Ohio St. 9 (1883).

59. Thompson v. Brown, 4 Johns Ch. 619 (1820); Wild v. Davenport, 48 N. J. L. 129 (1886); Stephens v. James, 77 Ga. 139 (1886); Rogers v. Wheeler, 43 N. Y. 598 (1871); Jones v. Seligman, 81 N. Y. 190 (1880); Manhattan Oil Co. v. Gill, 118 N. Y. App. Div. 17 (1907); Mayo v. Moritz, 151 Mass. 481 (1890); Hussey v. Arnold, 185 Mass. 202 (1904); Carr v. Leahy, 217 Mass. 438 (1914). But see Frost v. Thompson, 106 N. E. 1009 (Mass. 1914) and Adams v. Swig, 125 N. E. 857 (Mass. 1920).

60. McCarthy v. Parker, 138 N. E. 8 (Mass. 1923); Rand v. Farquhar, 115 N. E. 286 (Mass. 1917); Hussey v. Arnold, 185 Mass. 202 (1904); Imperial etc. Co. v. Jewett, 169 N. Y. 143 (1901). The validity of such an exemption from liability was doubted by a minority of the court in Hibbs v. Brown, 190 N. Y. 167 (1907). A provision in the trust instrument that the organization shall not be deemed a partnership is of little avail. Wrightington on Unincorporated Associations, 2nd ed. (1923) pp. 76, 77. Each trustee is liable to a creditor who did not know that the declaration of trust provides for an exemption from liability. Webster and Sons v. Utopia Confectionery, 254 S. W. 123 (Tex. 1923).

tected by a waiver.[61] Altogether this possibility of liability is uncomfortable. In an active business many contracts are oral or informal or the waiver may be inadvertently omitted or the creditor may object to it. Then there is the liability for torts. All this militates against the Massachusetts Trusts supplanting the corporation.

Another disadvantage is in suing or being sued in the name of the association. Especially is this true in that such an association cannot sue or be sued in the federal courts unless the necessary diverse citizenship exists as to all of its shareholders, even though the state statute authorizes the association to sue or be sued in its own name.[62] This is a serious deprivation. And in the state courts, if all of the shareholders must be joined as in a partnership, it is embarrassing; so much so that statutes in some states, as in New York, Pennsylvania, Michigan, Maryland and Texas, allow such associations to sue and be sued in their own name or the name of an officer. Even Massachusetts has now approached statutory joint stock companies by allowing Massachusetts Trusts to be sued in their own name.[63]

And there are other disadvantages. On many questions relative to unincorporated associations the law is unsettled. It is true that the courts hold that so far as practicable the decisions as to corporation law will be applied to these associations.[64] But when? For instance, although a certificate of shares in an association may be pledged and foreclosed like a certificate of stock in a corporation,[65] yet a statute that a pledgor shall have the right to vote has been held not applicable to a pledge of a certificate of shares in an association.[66] Does a shareholder have a right to examine all of the books and papers, or does he have only such rights as a stockholder has in a corporation?[67] This is undecided. Every Massachusetts Trust is either a partnership or a trusteeship as shown above; and if a partnership, it is familiar law that any partner may at any time inspect the partnership books and papers;[68] while, if a trusteeship, it is equally familiar law that a *cestui que trust* has a right to inspect all documents and papers relating to the trust.[69] Again does a Massachusetts Trust resemble a corporation in that it may be compelled in a criminal case to be a witness against itself and hence may a grand jury reach its most secret papers by a *subpoena duces tecum?* It is to be noted also that a court may remove a trustee of a Massachusetts Trust and appoint his successor,[70] but not so as to a director,[71] unless authorized by statute, as in New York, where removal by the court is provided for.[72] Again, attachment statutes would be supposed to apply to shares in an association the same as in a corporation but apparently not in Michigan.[73] A life estate in the shares of a joint stock company is the same as in a corporation,[74] but the liability for paying dividends when there are no profits is decidedly unsettled.[75] The duration of an unincorporated association, even though it is organized under a trust instrument and has trustees and owns real estate in their name as trustees, may be for any number of years, where the trustees have power to sell the property, or the shareholders have power to dissolve and wind up the business.[76] A shareholder in an unincorporated association transacting business cannot sue other shareholders at law on a cause of action growing out of the business until there has been an accounting and settlement of the partnership affairs.[76a] Blue Sky Laws may or may not apply to the shares of Massachusetts Trusts according to the words of the statute, but generally such statutes do apply.[77] A statute providing for cumulative voting does not apply to unincorporated associations,[78] and it is a question whether that useful statute authorizing courts to review summarily the validity of corporate elections applies to these associations. One decided advantage a Massachusetts Trust certainly has over corporations, namely, that while a state may exclude a non-resident corporation from doing business in the state unless that business is inter-

61. Sanchez v. Deering, 288 Fed. 412 (1923); Mayo v. Moritz, 151 Mass. 481 (1890).

62. Chapman v. Barney, 129 U. S. 677 (1889) as to New York; Great, etc., Co. v. Jones, 177 U. S. 449 (1900) as to Pennsylvania. This harks back to the original decisions in Strawbridge v. Curtiss, 3 Cranch 267 (1806) and Bank of the U. S. v. Deveaux, 5 Cranch 61 (1809) to the effect that the jurisdiction of the federal courts depends on the citizenship of the stockholders, instead of the corporation itself. They were practically overruled in Louisville R. R. Co. v. Letson, 2 How. 497 (1844).

63. Malley v. Howard, 281 Fed. 363 (1922). An appeal in this cause was argued in the Supereme Court of the United States on May 3, 1923, but the decision has not yet been handed down.

64. Bray v. Farwell, 81 N. Y. 600 (1880); Ostrom v. Greene, 161 N. Y. 353 (1900).

65. Beal v. Carpenter, 235 Fed, 273 (1916).

66. Linnell v. Leon, 206 Mass. 71 (1910).

67. The case Matter of Hatt, 57 N. Y. Misc. 320 (1908) holds that the New York statute allowing stockholders to examine the books applies to shareholders in joint stock companies, although the court declined a mandamus in that case.

68. Rowley on Partnership, §369, p. 439.

69. Perry on Trusts, 6th ed., Vol. 2, §822, p. 1352.

70. Burnett v. Smith, 240 S. W. 1007 (Tex. 1922).

71. Neall v. Hill, 16 Cal. 145 (1860); Johnston v. Jones, 23 N. J. Eq. 216 (1872).

72. People v. Lyon, 119 N. Y. App. Div. 361 (1907); aff'd. 189 N. Y. 544.

73. Lyon v. Denison, 80 Mich. 371 (1890) relative to shares in a joint stock sporting club. cf. Montgomery v. McDermott, 103 Fed. 801 (1900).

74. Bishop v. Bishop, 81 Conn. 509 (1909).

75. In Digney v. Blanchard, 115 N. E. 424 (Mass. 1917) it is held that the trustee of a real estate trusteeship cannot be compelled to pay a receiver of the concern dividends already paid to the shareholders so far as the receiver represents shareholders, nor can the receiver recover for creditors if the trust was solvent when the dividend was paid. In Gardiner v. Gardiner, 212 Mass. 508 (1912) it is held that where preferred shares in an unincorporated trusteeship to hold stock in corporations are issued by the trusteeship to the preferred shareholders to pay arrears of preferred dividends, a life tenant of an estate owning preferred shares is entitled only to the income from such newly issued shares, there not having been any profits added to the capital as representing such increased preferred shares. Under the New York statute authorizing the courts to dissolve a joint stock association for good cause, the fact that dividends are not declared does not in itself justify dissolution. Colton v. Raymond, 85 N. Y. Supp. 210 (1903) aff'd. 114 N. Y. App. Div. 911.

76. Howe v. Morse, 174 Mass. 491 (1899) where the court held that an unincorporated association to acquire, rent and sell land does not violate the rule against perpetuities nor create an illegal restraint upon alienation, and that a shareholder cannot have it wound up as illegal, even though it might continue beyond lives in being and twenty-one years, there being a provision that it might be terminated at any time after five years on a three-fourths vote of the association. The court said (pp. 504, 505): "The entire ownership is never for a moment uncertain, nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary processes of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest. . . . The provision in the present trust, that the shareholders are not to have any interest or title in the trust property itself, and no right to call for partition, and that the share shall be personal property, is not a restraint upon alienation, since the alienation of the legal and the equitable ownerships is provided for." In Hart v. Seymour, 147 Ill. 598 (1893) the court said: "Where there are persons in being at the creation of an estate capable of conveying an immediate and absolute estate in fee in possession there is no suspension of the power of alienation and no question of perpetuities can arise." In Williams v. Montgomery, 149 N. Y. 519 (1896) an agreement not to sell stock for six months was upheld. The court said that under the New York statute the power of alienation is suspended only when there are no persons in being by whom an absolute title can be conveyed, and that "the test of alienability of real or personal property is that there are persons in being who can give a perfect title," and that "where there are living parties who have unitedly the entire right of ownership, the statute has no application," and that inasmuch as the agreement of several persons not to sell for a specified time may at any time be waived or canceled by unanimous consent, the statute does not apply. Crehan v. Megargel, 234 N. Y. 67 (1922) holds that a trusteeship to furnish capital for the trustee becoming a "special partner" in New York for five years or until his death is really dependent on his life and hence is no suspension of alienation under the New York statute.

76a. Hardee v. Adams Oil Ass'n, 254 S. W. 602 (Tex. 1923).

77. Schmidt v. Stortz, 236 S. W. 694 (Mo. 1922); Home Lumber Co. v. Hopkins, 107 Kan. 153 (1920); Ex *parte* Girard, 200 Pac. 593 (Cal. 1921). But see Superior Oil, etc., Syn. v. Handley, 195 Pac. 159 (Oreg. 1921). The Massachusetts statute against any corporation or association issuing bonds or other obligations to be redeemed in numerical or any arbitrary order irrespective of how much has been paid thereon, applies to a Pennsylvania unincorporated association selling its bonds in Massachusetts and the state may enjoin such sales. Long v. Cooperative League, etc., 140, N. E. 811 (Mass. 1923).

78. Attorney-General v. McVichie, 188 Mich. 387 (1904).

state commerce, yet under Article IV, § 2, Par. 1 of the Constitution that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," a state cannot exclude a non-resident trustee from doing business in the state, nor impose on him burdens not imposed on similar resident trustees.[79] How far this applies to trustees of associations remains to be seen.

There are many other established principles of corporation law, which have been worked out during the past two hundred years and which clearly apply to corporations, but very doubtfully to these associations. The trust instrument may provide for them but that would be to codify corporation law. Certain it is that in a common law trusteeship the *cestui que trust* had few rights or powers, chiefly to compel compliance with the trust, to call on the trustee to account, and to ask a court to remove the trustee for cause.

On the whole the Massachusetts Trust may be said to be simply old common law unincorporated business associations, except a few of them which are trusteeships, but only a few. As associations they are midway between corporations and partnerships. Like corporations they have transferable shares and continuity of existence. Like partnerships they escape the worst exactions of the tax gatherers and legislative regulators, whose special prey is the corporation. They will never displace the corporation in a large way, because the latter gives limited liability, and the stockholders' rights are well defined, and the relations between stockholders and officers are business-like and impersonal, and the stock more salable. Only 64 Massachusetts Trusts registered their declarations of trust in the office of the Massachusetts State Commissioner in the year ended November 30, 1922, as required by the Massachusetts statutes, while during the same year 2339 certificates of organization of business corporations were approved by the Commissioner.[80] These figures show that the Massachusetts Trusts make a noise out of all proportion to their size. But they furnish a simple mode of organization, free from interminable statutory requirements. It is to be hoped that Congress and the state legislatures may forget their existence. But they should be made to pay their debts, whether partnerships or trusteeships. Where the shareholders of these Massachusetts Trusts claim exemption from personal liability they are usurping the one remaining valuable characteristic of corporations and should pay the price, namely, taxation and the numerous burdens to which corporations are subject.

79. Barnes v. People, 168 Ill. 425 (1897); Hoadley v. Board Ins. Com'rs., 37 Fla. 564 (1896). A state statute excluding non-resident individual trustees from being mortgagees is unconstitutional. Farmers L. & T. Co. v. Chicago, etc., Ry., 27 Fed. 146 (1886); Shirk v. LaFayette, 52 Fed. 857 (1892); Roby v. Smith, 131 Ind. 342 (1892).

80. For this information I am indebted to Albert E. Taylor, Chief Clerk to Hon. Henry F. Long, Commissioner of Corporations, at the State House, Boston, Mass.

Officials Who Count

"The prosecutor who puts fear in the heart of the criminal is one who prepares his cases well, tries them in accordance with the established rules governing criminal trials, and works untiringly but dispassionately to put the law-breaker behind the bars. The judge who is contributing to the solution of the problem is the one who devotes his full time to the trial of criminal cases until his docket is cleared, and who, without display of authority but with quiet, firm dignity, promptly and finally decides the matters presented to him."—From Report of Section of Criminal Law at Minneapolis.

The American Citizenship Movement

President Saner Delivers Addresses Before the West Virginia and Rhode Island State Bar Associations

THE aims and program of the American Bar Association's Committee on American Citizenship are being forcibly brought to the attention of the profession and the general public by a series of addresses being delivered by President Saner, chairman of that committee, before various State Bar Associations. On November 15, he spoke to the West Virginia Association at its annual meeting held in Morgantown in that state on "The Lawyer and the State." It was a strong appeal to lawyers to assume leadership in lines where they are peculiarly fitted to lead. "Time was," President Saner stated on that occasion, "when the lawyer was generally recognized as the civic leader in his particular community or state. His very profession qualifies him to inform the public regarding the principles of our government and the application of those principles to present-day problems. We must today as never before in our history make sure for ourselves and for all of our citizens that we cling to the fundamentals, to the principles and the practices which have enabled us to build so successfully, and thus avoid the errors which tend to impair our vigor and becloud our future. We must let the public know, for example, that so-called pure democracy in America is utterly impracticable and that attempts to attain this condition have not only been lamentable failures, but are contrary to the genius of our representative form of government. We must make the people realize that while we must stand irrevocably for the preservation of our Bill of Rights, the people as a whole must show themselves worthy of individual liberty; that freedom of speech, for example, is for those who know the speech of freedom; that when people talk about our needing a new Constitution we should rather counsel them not to do anything rash until we really thoroughly try out the old one; and in view of the threatening advance of Federal Paternalism and Bureaucracy, that the proper Constitutional functioning of the Federal and State government is no less a vital issue today than it was in the times preceding our Civil War."

On December 3 he delivered another address before the Rhode Island State Bar Association on the subject of "The Vision of Our Fathers and Present Day Visionaries." After pointing out the petty views which have succeeded in many quarters to the broad and forward-looking vision of the men who drafted the Constitution, he declared that "Our American Republic has lived until this good hour because it has been animated and protected by our Constitution. It will continue to live just so long as we stand squarely on the foundation principles enunciated in that great Charter of our Liberties—and it will live because through such meetings as this we will have convinced the great mass of our people that we have a better government than any other that is now being proposed by doctrinaires and various representatives of communistic states. I will wager the vision of our fathers against all those visionary schemes. The Constitution of the United States is the one great Gibraltar of well-balanced Government left in this world."

THE LAWYERS WHO REALLY COUNT

It Is the Advocate That in the Popular Mind Represents the Lawyer and It Is in the Discharge of the Advocate's Task That the Immense Appeal Which the Profession Makes to the Civilized World Resides*

By the Earl of Birkenhead
Former Lord Chancellor of Great Britain

THE late hour of the evening, the abundant harvest of admirable oratory which we have already enjoyed and the fact that you showed me so much indulgence in the course of a somewhat wearisome address a few nights ago, would combine to render it very unsuitable that I should make an extended demand upon your patience tonight.

I listened with great interest to the speech of the honorable Senator[1] who last addressed you. He reminded me of an occasion in London in which it was suggested that I made use of observations which, in the mouth of a hostile critic, might be supposed to be derogatory to the honorable Senator. Gentlemen, I will be extremely frank with you. I have no defense to the charge which the honorable Senator made against me as to that which I said to the chairman of the meeting, except that I had not the slightest idea that the honorable Senator could overhear what I did say. (Laughter.)

Now it has occurred to me that in the very few observations which I ask leave to make tonight I might deal with the only lawyers who really count. All the world over, in every country in the world, there are of course some lawyers who make fortunes by comparatively unimportant dealings with property or railways or companies and all that complicated series of transactions which I have never been able to understand (laughter), but those are not really the lawyers to which the whole world owes a debt of gratitude. The world understands the lawyers, and everybody understands what you mean when you say you are going to see a dentist, or you are going to see a doctor, and every lady understands what you mean when you say you are going to see a lawyer. There are lawyers in that sense. It is in that sense that I use the term lawyer; the only lawyers who really count are the advocates, because the advocates step in when something serious is happening or maybe going to happen. Say it may be a murder case, it may be all kinds of other cases, but it is the advocate that really in the popular mind represents the lawyer, and it is in the discharge of the advocate's task that the immense appeal which the profession of the lawyer makes to the civilized world resides.

I was an advocate for a great many years. I have been a judge now for five years. I spent the greater part of my life in being an advocate, and I am bound to say that the most amusing years in my life were spent when I was at the Bar, and incidentally, I might add, the most profitable years of my life. And of all the cases in which I was ever employed I never remember being so completely disconcerted as when I was attempting to cross examine a witness in the very first case which I had the fortune to have at the Bar; and I may say to those here who happen to be laymen that it is not the barrister's business, and he does not like, to be disconcerted by a witness. (Laughter.) It is considered to be unfair, rather bad form—on the part of the witness. (Renewed laughter.) But by a strange chance the very first case in which I took part was the one which disconcerted me more than any other in which I was ever engaged. It was a small collision case and I appeared for the steamship company against the owners of a sailing schooner in respect of a collision which took place in the river Mersey. I was developing a most masterly cross-examination of the master of the schooner, my simple scheme being to prove that the man was drunk and had been drunk for two hours before the collision took place, instead of attending to the navigation of his vessel. Unfortunately, in my desire to be impressive I carried the matter just one stage too far, because I said, "Captain, I want you to understand the question I am putting to you and its implication; I put to you this, for an hour and a half before this collision took place you were drunk in your cabin?" And he said, "I was not." And I said, "I put it to you that for an hour and a half before this collision you were never on the bridge of your vessel?" And he replied, "There ain't no bridge on a s'iling ship." (Laughter.)

Well, gentlemen, you will agree with me that he was an extremely rude man. But I did not at that moment and in that stage of my professional development quite see the answer to that observation. And I have never succeeded in seeing it since, and I have reflected deeply. I suspect that many of you must have had experiences of that kind, but I confess now that I look at the Bar rather from the same kind of an angle from which I imagine that my distinguished friend, the Chief Justice of the United States, looks at it. And now I will take the Bar, to this extent, into our confidence, that in our country—not indeed in yours, because with that consideration of time which distinguishes a businesslike community, I understand that the eloquence of counsel is nicely and meticulously regulated by an hour glass—but in our old-fashioned country where time counts for so little in comparison with yours, the eloquence of counsel is regulated only by the tact or resolute qualities of the Bench. (Laughter.) And therefore we are very much at the mercy of counsel, and that is the reason why all judges in England always treat all counsel with great courtesy and consideration.

I cannot understand why any American judge should ever take the trouble to treat counsel with such consideration, because he can stop him whenever he wants. Our trouble is that we cannot. There is a well known story of the counsel who was addressing the Court of Appeals and he had exhausted, with about a three hours' margin to spare, alike all the relevant

*Address delivered at banquet of the American Bar Association at St. Paul, Minn., on August 31, 1923.

[1]Ex-Senator J. Hamilton Lewis, of Illinois.

topics with which he was reasonably concerned and equally the patience of the tribunal. They made every attempt to put him down. They failed to put him down. It was a hot day and they proceeded to go to sleep. I suppose even in America, judges occasionally, like Homer, sleep. But he let loose one phrase of hope. It was almost the only phrase of hope in the whole of his long two hours' argument. He said, "My lord, when I reached that point in my argument in the court below, the court stopped me." The Master of the Rolls presiding over the Court, I imagine incautiously supposed to have been sleeping, suddenly developed into a brusque activity, and he leaned over and said, "In God's name, how did they do it?" (Laughter.) To which the learned counsel quite imperturbably replied, "My lord, by fraudulently pretending to be with me." (Renewed laughter.)

And then there was the case of that other counsel, this was an Irishman, who also developed an inexhaustible argument upon an exhaustible case. After he had gone on for four hours the President of the Court said to him, "Mr. Murphy, is it any good for you to continue? Everything you say goes in at one ear and comes out of the other." "Why not," said the counsel, "there is little enough to stop it." (Laughter.) But some of the wittiest things that were ever said at the Bar in my experience were said by a layman who had fallen upon tragic days, a layman most sophisticated in forensic ways, I mean Mr. Bottomly.[1] I have observed the play of his wit and of his capacity in many cases and I must say that I never heard a readier-witted man in any court of law. I remember once when someone brought a libel action against him, I represented the publishers and another advocate represented the editor, or some such arrangement as that. The plaintiff did not appear. The plaintiff, according to Mr. Bottomly's view, was a man of slightly irregular habits, and he invited the learned judge, who was Mr. Justice Darling, to postpone the case to the luncheon interval in order to give the plaintiff an opportunity of appearing because, as you gentlemen well know, a plaintiff who seeks to recover damages for injury to his character in a libel suit does not put his case very high if he does not even go into the witness box. So at two o'clock Mr. Justice Darling ordered the name of the plaintiff to be called by the ushers outside the court. The jury, of course, who were to decide the case, were in their box. So they called outside of the court, "Mr. Jones!", or whatever the plaintiff's name was, three or four times. Then the ushers came back and said, "My lord, there is no answer." Mr. Bottomly arose quietly and said, "May I make a suggestion?" And Mr. Justice Darling said, "Certainly," and Mr. Bottomly said, "The ushers have not yet tried the refreshment bar." (Laughter.)

The effect of that insidious and poisonous suggestion upon the minds of the jury may very easily be imagined.

And I remember in the same case—it was not Mr. Bottomly's habit at that time to go very frequently into the witness box—that counsel for the absentee plaintiff, in order that he might attempt to obtain some counter advantage, in the course of his speech said, "Wait until Mr. Bottomly goes into the witness box." He never thought, of course, that Mr. Bottomly would go. But Mr. Bottomly had taken his measure very completely and departing from his usual habit, the moment the plaintiff's case was over, stepped to the witness box and said, "If you wish to cross examine me here I am." The plaintiff counsel was a junior member of the bar, and the last thing he wanted to do was to cross examine Mr. Bottomly. When he got into the witness box, he said, "Mr. Bottomly, I believe there are forty-eight petitions in bankruptcy filed against you at this moment, are there not?" "Oh, surely, said Mr. Bottomly, far, far more than that." Then following that matter for two or three sentences more, he said, "Now, Mr. Bottomly, I am going to ask you a serious question." Mr. Bottomly replied, "Yes? No doubt to distinguish it from your previous one." (Laughter.)

Gentlemen, no one who has lived his life at the Bar as I have lived mine and you have lived yours, can fail to remember many hundreds of diverting incidents that have occurred in the practice of our profession and how welcome they are. How dull most cases are, and how eagerly we receive any little illumination which comes from wit, even if it be judicial wit. (Laughter.) I have listened to the glee, not always I thought disinterested, with which the efforts of some of my brethren have been received by an intelligent Bar, and I can speak of this quite indifferently because in the whole five years which I have been on the Bench I have never made a joke, I have never said a funny thing, and indeed I have thought of quite a number of funny things I could say. But we have one very witty judge in England, Mr. Justice Darling, and I shall close this series of random and discursive reminiscences with one illustration of what I think was a very considerable instance of judicial humor at its best.

This was an occasion when the Attorney-General was attempting to confiscate large German financial interests in certain lines. The issue arose under our emergency war legislation. The case was of enormous complication and I had been working it up for several weeks, and the day was fixed for hearing. Two days before the hearing the attorney for the defendants came before Justice Darling and asked for an adjournment for a month. Mr. Justice Darling said to me, "What are you going to say to this?" And I said, "It is a most unreasonable application. We have been preparing this case for a month. They have known the day upon which the case was coming on and to apply two days before for a month's adjournment is wholly unreasonable and the application ought to be rejected." So the judge said to the counsel on the other side, "Why do you ask for so long a period of delay as a month?" And counsel replied, "Because the documents in the case are extremely bulky and they all relate to German Mining Law and the language employed is all German and is all extremely complicated." Mr. Justice Darling replied, "Rather a good idea occurs to me. You want to get this translated. Why not go to somebody who knows German already?" (Laughter.)

Well, gentlemen, I suspect that the comedy and the humor of our great profession as it is practiced in this country does not differ very greatly from those qualities as it is practiced in my own country. And after all, when the last joke is made at the expense of the lawyer, and more particularly at the expense of the advocate, it still remains the noblest and in many ways the bravest profession in the world. The advocate knows little preclusion upon his one special task, and that is to strive against all forces, however powerful, against all combinations however wealthy, and at all costs for the fortunes of the client. My predecessor

1. Editor of "John Bull," a sensational London weekly publication.

on the woolsack, the great Lord Brougham, put it indeed even too high, for he said, "The advocate knows no duty and no restraint except such duties and such restraints as are imposed upon him by the interests of his client." That is too broadly stated, but it can be stated broadly enough to indicate the qualities and the resources and the courage that are required of the advocate who fully discharges his duty. I remember well a case in which it became the duty of Sir Edward Clark, then the head of the English Bar, to cross-examine with severity that distinguished Prince, who afterwards became known to history as King Edward VII. No personal choice could have rendered such a duty attractive. Every consideration of personal inclination must have repelled the advocate from that task. But it was discharged with a courage and an unshrinking completeness, with an unswerving duty to his client, as if the man he was cross-examining were the humblest citizen of England.

And here we get rid at once of all the sophistry with which this topic has been involved. When people who are not lawyers ask "how can an advocate appear on behalf of a client whom he knows to be guilty?" the answer is that no advocate has any business to know that his client is guilty. In my younger days in the Bar I appeared in many criminal cases. I never in the whole course of my career allowed any criminal for whom I was appearing to have any confidences with me. I do not know that many of them were extremely ambitious of the distinction, but if they were they did not obtain it. The robust common sense of Doctor Johnson led him to say the first word and the last word upon this debated topic. He said, "The advocate is not to usurp the functions of the judge; the advocate is to make himself the mouthpiece of him who is accused." And if you take the extremest case of all, the case where it has been put at its strongest against the ethical situation of our profession, the case where a confession has been made by a prisoner to an advocate—I would meet that case without hesitation. It arose once at a critical stage of a great English litigation. I would meet that by saying, "You are not to be the judge of whether that confession is made under an aberration, under a delusion, in hysteria; you are to put the whole facts of that case as those facts are known to you before the jury and before the judge, and they and not you are to decide as to the facts that have been proved, and as to the reliability of that which has been admitted."

Ladies and gentlemen, the ethics of our profession have been made the subject of infinite debate. On the whole through the generations and through the centuries they have sustained the force of every hostile animadversion that has been made upon them, and in dark and critical days in every great democracy in the world the advocates of the country by their devotion and their courage have made themselves the principal maintainers and buttresses of liberty. It was well said that under a despot the quality of rhetoric counts for little, but in every free country it counts for much. It has been that quality, the quality of rhetoric —infinitely flexible, admitting of infinitely various applications, emotional it may be when attuned to an emotional cause, dry and analytic when the occasion calls for an exhibition of that form of forensic skill—is the greatest gift which God gave to man, and it is exhibited, I deliberately state my conclusion, more conspicuously and more bountifully by the legal population of the great Democratic countries of the world than by any section of any population which the world in its gradual progress towards complete civilization has reached. (Applause.)

CURRENT LEGISLATION

CHANGES IN COMMUNITY PROPERTY LAWS

By J. P. CHAMBERLAIN

THERE exists in seven states, some modification of the Spanish legal institution of the community of property between husband and wife. (Arizona, California, Louisiana, Nevada, New Mexico, Texas, Washington.) See McKay "Community Property" p. 37n. Changes in that institution therefore become of more than local interest and merit attention in the review of current legislation the more so that, being itself the creature of the Legislature, it must receive its important changes at their hands. A very important modification in the existing system was effected in California by Chapter 18—Laws of 1923, amending sections 1401-2 of the Civil Code. This act greatly increases the wife's rights in the community, thus following the trend so marked in recent years toward putting the woman as nearly as possible on a footing of legal as well as political equality with the man. Under the former law, the wife if she survived her husband, received one-half of the community property, which included all acquisitions during coverture, except gifts, bequests and devises, and the income from all separate property. The other half was subject to his testamentary disposition, or descended to his legal heirs, among whom the wife was entitled to a large share. If the husband, however, was the survivor the whole property became his. This legal situation was, however, a change in favor of the husband, of the original rule which gave one-half of the community to the survivor, husband or wife, and the other half to the descendants of the deceased spouse. If there were no descendants all went to the survivor. Packard vs. Arrellanes, 17, Cal. 525. The new law puts both spouses on an equal footing when the community is dissolved by death. One-half of the property goes to the survivor, "the other half is subject to the testamentary disposition of the decedent." If there be no will, the survivor takes the whole.

It is interesting that in the original community property law the survivor took everything subject to the right of inheritance of the children of the deceased, while under this newest version, the surviving spouse receives the whole property, unless the deceased, by an express act, making a will, declares the intention that it shall go to another. In the old law, the decision was by operation of law, in the event of there being children; in the new, it can happen only by the

wish of the deceased spouse. Washington and Arizona have adopted a different system. In Washington on the death of either party, the survivor takes only one-half, the other half being subject to the disposition of the decedent, and in case there is no will, it goes to the legitimate issue of "his, her or their bodies" and their representatives. In default of will or representatives, all goes to the survivor. Remington's Code 1922, §1342. Arizona makes the division complete. The decedent's half, if not disposed of by will, goes to the descendants and if there be no such is subject to distribution like separate property. Arizona Rev. Stats. 1913, §1100. The flexible California provision permits the spouse to agree that there shall be no change in management in case of the wife's death. The husband may continue as sole owner if she makes no will. This may well be of great importance in case the husband is conducting a business since there will be no interference in its affairs by administration of her estate. This same situation is the cause of a rule adopted in many community property states extending the husband's management of the community after the wife's death. McKay p. 512. The draftsman of the California act adopted this rule. He continues the husband in possession and control of the community property, with the same power which he had in his wife's life time, "pending administration." In respect to the realty a peculiar rule gives the husband the power to deal with and dispose of the community realty "unless a notice is recorded in the county in which the property is situated, to the effect that an interest in the property is claimed by another under the wife's name.' Under the old law in California, giving the wife the right of disposition of her share of the property, there was no statutory regulation of the husband's position during administration, but he was permitted by the courts to continue his management and was held to act as trustee for her heirs or devisees. This will undoubtedly be his position under Chapter 18, 1923, California Laws.

Another interesting statute, Chapter 347 California Laws 1923, calls attention to the difficulties which attend the existence of this secret right of the wife's and is also a striking case of prompt legislative action in an attempt to correct a situation developing from court action. On January 26, 1923, the Court of Appeals, an intermediate appellate court, held that a policy of insurance on a husband's life, taken out by him during marriage and payable to his estate, is community property so that a change of beneficiary under a clause in the policy permitting such change, is void so far as his wife's half share is concerned. N. Y. Life Insurance Co. vs. Bank of Italy and Newman 214 Pacific 61, McKay p. 286. In this case the insurance company having had claims filed by both the wife and the beneficiary, paid the money into court and asked to have the court to determine which was entitled to it. The cardinal principle of life insurance, prompt settlement of claims, was clearly jeopardized. In every case of a claim on the death of a man the company was in doubt whether the named beneficiary was in fact entitled to the money, or whether a wife of whose existence the company knew nothing, might not turn up unexpectedly. If she did, her right to one-half of the policy was clear and the change of beneficiary was, as to her half, void unless there was enough other property in the estate to pay her. In such case the gift would probably take effect, as being made out of the husband's share of the community. McKay §313, citing Spreckels vs. Spreckels, 116 Cal. 339. No difficulty would arise in case the beneficiary is the wife or her estate, for in that case the husband would be considered as having made a gift of his interest to his wife. McKay p. 288. The same result might arise in case of an assignment of a policy payable to the insured's estate, for if the assignment was gratuitous it would be equally void as to the wife's share. The difficulties to policy holders resulting from this decision were pressed on the Legislature, and it promptly passed Chapter 347, on the 24th day of June, 1923. The act provides: "The proceeds of every policy of insurance due on the death of insured shall by the insurer be paid either to the beneficiary designated therein, or if no beneficiary is designated therein, to the estate of insured; or, if the policy has been assigned, to the assignee thereof; and such payment shall satisfy all obligations of the insurer with respect to said policy."

The question of the rights of the community in insurance policies on the lives of husband and wife has been discussed in Louisiana and Texas. 31 Corpus Juris, Page 35. In Louisiana the status of the proceeds depends on whether the contract was entered into before or after marriage. If it was entered into after marriage and the facts were similar to the Newman case the same difficulties might arise as in California in any case if the insurance company had had notice of the claim before payment to the designated beneficiary. Succession of Buddig 32 So. 361, Succession of Le Blanc, 76 So. 223. In Texas in an early case it was held that property in the avails of the policy was not acquired until death. As death dissolved the community, the property, the money paid on the policy was not acquired during coverture and was not part of the community. Martin vs. McAllister 63 S. W. 624. This rule was re-affirmed in Whiteselle vs. Insurance Company 221 S. W. 575. In the McAllister case the policy was taken out by a husband on the life of his wife, naming himself as beneficiary, and a later decision limited the rule to cases in which a beneficiary was named, and held that where the estate of a deceased husband is beneficiary, the proceeds of the policy are community property. Lee vs. Lee, 247 S. W. 829.

The common law of marital property relations also underwent a change in Arkansas. By chapter 315 the tenancy by curtesy was abolished and the rights of the husband in the wife's property made exactly the same as those of the wife in the husband's.

The Balance Wheel of Society

"The balance wheel of the social structure is the so-called middle class—salaried men, professional men, small merchants and the like. As a class they are loyal to the last degree, law abiding, with families and small savings or property investments which give them an interest in the stability of the country. The existence of some lawless discontent and some inordinate and privileged wealth does not threaten the security of the state—no state has ever been without these extremes. But should economic conditions so press on the middle class that their sympathies turn toward radicalism things will begin to happen. There are some signs that such a condition is now approaching. The cost of living which bears so heavily on all except the wealthy is apparently no accident and no product of natural laws. It seems to be due in part to bad business methods and in part to reckless profiteering."—Law Notes.

SEARCH AND SEIZURE: BOYD vs UNITED STATES

Fundamental Error in the Boyd Case* and Subsequent Cases Following in Its Wake Is Overlooking Fact That in Many Instances Arrest, Search and Seizure May Be Made Without Warrant and Also the Distinction It Makes Between Written and Other Mute Evidence of Crime

By the Late Senator Knute Nelson

Formerly Senator from Minnesota and Chairman Senate Judiciary Committee

THIS case has led to some confusion in the courts in the matter of search and seizure, especially under the National Prohibition Act. Justice Bradley, who wrote the opinion of the court in the case, seems to have overlooked material facts in the case and to have drawn unwarranted conclusions from the decision of the court in the case of Entick v. Carrington, 19 Howell's State Trials 1029, one of the cases arising from the search of Wilkes' house under a general warrant issued by Lord Halifax.

Boyd v. United States was a proceeding in the District Court to enforce the forfeiture pursuant to Sec. 12 of "An Act to Amend the Customs Revenue Laws and to Repeal Moieties," passed June 22, 1874 (18 Stats. 186) of 35 cases of plate glass alleged to have been imported in fraud of the customs laws of the United States. On the trial of the case, it became important to show the quantity and value of the glass contained in 29 cases imported a short time previous to the importation of the 35 cases, and under the same law.

Pursuant to Sec. 5 of the Act, the district attorney procured an order from the District Court, requiring the defendants to produce, for inspection and use on the trial, the invoice of the 29 cases referred to. The invoice was produced, but when offered as evidence in the case, objection was made to its introduction on the ground that the forfeiture proceeding was a criminal case and that to receive the invoice in evidence would be to compel the defendants to be witnesses against themselves. The District Court overruled the objection and admitted the invoice in evidence.

The case reached the Supreme Court, and there the chief error assigned was compelling the production of the invoice and the admission of the same in evidence.

Justice Bradley, on behalf of the court, in his opinion held that all this was in violation of both the Fourth and the Fifth Amendments to the Constitution.

The Court seems to have entirely overlooked and given no consideration to the following provisions of law governing the importation and entry of the cases of plate glass in both cases. Sections 9, 10, and 11 of the Act read as follows:

> Sec. 9. That except in the case of personal effects accompanying the passenger, no importation exceeding one hundred dollars in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee, before any officer authorized to administer oaths, showing why it is impracticable to produce such invoice.
>
> Sec. 10. That no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement, in the form of an invoice or otherwise, showing either the actual cost of the merchandise included in such importation, or, to the best of the knowledge, information, and belief of the deponent, the foreign market value thereof; which statement shall be verified by the owner, importer, consignee, or agent desiring to make entry of the merchandise, and which oath shall be administered by the collector or his deputy.
>
> Sec. 11. That before such oath is taken, it shall be lawful for the collector or deputy administering the oath to question the deponent touching the sources of his knowledge, information, or belief in the premises, and to require him to make oath to the same, and to produce any letter or paper, in his possession or under his control, which may assist the officers of the customs in ascertaining the dutiable value of the importation, or any part thereof; and in default of such production, when so requested, such owner, importer, consignee, and agent shall be thereafter debarred from producing any such letter or paper for the purpose of avoiding any penalty or forfeiture incurred under this act, unless he shall show to the satisfaction of the court that it was not in his power to produce the same when demanded.

The Government can, by law, prohibit all importation of foreign goods and merchandise, and if it allows the importation of the same, it can prescribe the terms and conditions on which the import and entry may be made. The 29 cases of plate glass were not personal effects, and undoubtedly exceed $100 in value. Therefore, the same could not be "admitted to entry without the production of a *duly certified invoice thereof as required by law,*" or an affidavit showing why it is impracticable to produce such invoice. The statute prescribes the form and character of the affidavit, and also provides that the affiant before making the affidavit may be personally examined by the collector or his deputy as to sources of information or knowledge, etc. All this proof and evidence required by the sections quoted is in effect and substance the same as the *invoice* offered in evidence. The defendants, when they sought to enter the imports in question, by necessary implication agreed to furnish this evidence, and their availing themselves of the import privilege amounted to a waiver of any possible right to refuse to furnish such evidence. Green v. Weaver, 1 Simons (English) 404; State v. Davis, 108 Mo. 666. Moreover, had the defendants at the time of importing and entering the plate glass furnished the *duly certified invoice* required, there would have been no occasion for offering the original invoice in evidence for the *certified* invoice could have been offered in evidence in lieu of the original as a voluntary admission of the defendant, which could not have been tortured into the claim that it was compelling the defendant to give evidence against himself.

The District Court, in requiring the production of the *invoice* and allowing it in evidence, did in

*Boyd v. United States, 116 U. S. 616.

substance nothing more than to require the dependants to furnish the Government with the *invoice evidence* which they had already agreed to furnish and which they should have furnished when they imported the plate glass.

Experience has shown that there are frequent attempts to defraud the Government in the matter of the importation of foreign merchandise; so the Government, for its protection against such frauds, requires, among other things, that a duly *certified invoice* shall be furnished the Collector before entry is made. It is not an unreasonable requirement, and he who has the benefit of importations cannot object to such a reasonable burden; and if he complies with the law in furnishing a duly *certified invoice,* there can be no hardship in requiring him to produce the original invoice, for there is in substance no compelling of the defendant to give evidence against himself. It is merely compelling him to furnish the Government with the *invoice evidence* which he had, by clear implication, agreed to furnish when he imported the goods; and his availing himself of the import privilege amounted to a waiver of any possible right to refuse such evidence. Green v. Weaver, 1 Simons (English) 400; State v. Davis, 108 Mo. 666.

It seems to me, therefore, that if the court had given due consideration to Section 9, 10 and 11 of the Act, cited above, it would have reached a different conclusion.

Neither do I believe that Justice Bradley, on behalf of the court, was warranted in drawing all the inferences he made from the opinion of Lord Camden in the case of Entick v. Carrington. This case arose under a general warrant issued by Lord Halifax in the noted Wilkes case. The warrant neither described the place to be searched, nor the person or things to be seized.

Four questions or points, and only four, were raised and passed upon by the court, and these were as follows: (1) Had Lord Halifax the right or power, by virtue of his office, to issue the warrant? It was held that he had not such power. (2) Did an immunity statute, passed for the protection of Justices of the Peace in case of mistakes in issuing warrants, etc., apply to Lord Halifax? It was held that it did not apply. (3) Were the messengers who executed the warrant within the protection of the immunity act referred to above? It was held that they were not. (4) Was the warrant issued a legal and valid instrument, authorizing the search and seizure made? It was held that it was not and that it did not authorize the search and seizure.

Lord Camden concluded his opinion as follows:

> Upon the whole we are all of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void.

There is no analogy between the facts in this case and those of the Boyd case. Lord Halifax's warrant required

> a strict and diligent search for the author, printer and publisher of a seditious and treasonable paper entitled "The North Britain" . . . and them, or any of them, having found to apprehend and seize, together with their papers and to bring them in safe custody before me to be examined concerning the premises and further dealt with according to law.

There was no such warrant and no such search and seizure in the Boyd case as in the Wilkes case. In substance the court only decided that such a general warrant as was issued by Lord Halifax was invalid and void and was no justification for the search and seizure. Lord Halifax had no power to issue such a warrant.

The District judge in the Boyd case had the power to order the production of the invoice. Hale v. Henkel, 201 U. S. 73. The order to produce the invoice was in substance no more than requiring the defendants to produce the evidence which, by necessary implication, they had agreed to furnish and which it was their duty to furnish to the Government at the time of importation and entry. Had they furnished such evidence, there would have been no occasion or necessity for ordering the production of the invoice, and if they had failed to furnish the invoice evidence, they could claim no advantage of their own wrong.

It is further to be noted that the invoice required in such cases is a document prepared and furnished by the seller or exporter or the representative of the seller or exporter, and not a document furnished by the importer.

Justice Bradley assumes and decides that the order to produce the invoice was equivalent to an unreasonable search and seizure. Justice Miller, in a separate opinion concurred in by the Chief Justice, after stating that the order to produce the invoice was in effect a *subpoena duces tecum,* adds,

> But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effect of that party.
>
> There is in fact no search and no seizure authorized by the statute. No order can be made by the court under it which requires or permits anything more than service of notice on a party to the suit.

and after quoting Sec. 5 of the Act, further adds,

> Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court, and, when produced, the United States attorney is permitted, under the direction of the court, to make examination in presence of the claimant, and may offer in evidence such entries in the books, invoices, or papers as relate to the issue. The act is careful to say that "the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

and after quoting the Fourth Amendment, he further adds:

> The things here forbidden are two—search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.
>
> But what search does this statute authorize? If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses language carefully framed to forbid any seizure under it, as I have already pointed out.
>
> While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under

warrants, which were called general warrants, because they authorized searches in any place, for any thing.

In the case of Hale v. Honkel, 201 U. S. 73, the court held:

> We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in Summers v. Moseley, 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: Amey v. Long, 9 Kast, 473; Bull v. Loveland, 10 Pick. 9; U. S. Express Co. v. Henderson, 69 Iowa, 40; Greenleaf on Evidence, 469a.

It follows, therefore, from the foregoing statements that there was in substance no violation of either the Fourth or Fifth Amendment in the Boyd case.

The fundamental error in the Boyd case, and subsequent cases in the Supreme Court, that follow in its wake, is that they overlook the fact that in many instances arrest, search and seizure may be made without a warrant, and that they make a distinction between written or documentary evidence, and other mute evidence, of crime, giving a special sanctity to the former. The Fourth Amendment places *persons, houses, papers, and effects* all in the same category, all in the same pale; no preference or priority is given any one class above the others.

In the case of United States v. Snyder, 278 Federal Reporter, 650—a West Virginia liquor case, in which arrest, search, and seizure was made without a warrant—I find the clearest and best statement of the law in reference to search and seizure without a warrant, in the opinion of Judge Baker. After quoting the Fourth Amendment, the judge proceeds as follows:

> This provision of the Constitution should be construed in the light of, and in conformity with, principles of the common law, with which the framers of the Constitution were familiar. The amendment contains two separate and distinct prohibitions, to-wit: First, it prohibits *unreasonable* searches and seizures; and second, it prohibits the issuance of warrants, except upon probable cause shown, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.
>
> There is, in the amendment, *no prohibition against search or seizure without a warrant.* Such a prohibition would have been subversive of the common law and fatal to the safety of human life and the repression of crime. The second prohibition in the amendment was aimed against *general search warrants* as had then been in vogue for many years prior to the noted Wilkes Case in 1776, when the validity of such warrants was questioned and brought to issue in the Court of King's Bench. That court held such warrants to be illegal and contrary to the principles of the English Constitution. . . .
>
> *The Fourth Amendment to the Constitution contains no prohibition against arrest, or seizure without a warrant.* That was left under the rules of common law. The amendment provides *not* that no arrest, search, or seizure should be made without a warrant, but prescribes that there shall be no *unreasonable* search and seizure; in other words, that the people shall be secure in their persons, houses, papers and effects against *unreasonable* searches and seizures; *not against all searches and seizures, but simply against unreasonable searches and seizures.* And this brings us to the question: In what cases may arrests, searches, and seizures be made without a warrant, under the principles of the common law and statutory law prevailing in this country?
>
> It was the rule of the common law, at the time of the adoption of the Constitution, and it has been the rule of the common law of this country, and of most of the statutory law, that a peace officer—an officer charged with the enforcement of the law—may arrest a criminal when caught in the act of committing a crime, and when thus arrested he may search him for evidence pertaining to the crime, and, as a general rule, retain such evidence for the use of the court in the prosecution or trial of the case. . . .
>
> Thirty-three states have adopted laws of this kind, so that it can be said to be the common law of the states, or the common law of the great majority of the states, in the Union, that a peace officer, a prohibition officer, has the right to arrest a criminal offender caught in the act of committing a crime; and when he arrests him, if he captures him with counterfeit coin, if he catches him with smuggled goods, if he catches him with stolen articles, if he catches him with liquor under the Prohibition Law, *he has the right, not only to arrest him without a warrant, but to search him and to retain the wet goods as evidence against him.* . . .
>
> The Fourth Amendment does not prohibit searches and seizures without a warrant. *It only prohibits unreasonable searches or seizures,* and an unreasonable search or seizure is one for which there is in law a want of probable cause. In other words, it recognizes the rule of the common law then prevailing, and described in the decisions hereinbefore quoted. To hold that no criminal can, in any case, be arrested and searched for the evidence and tokens of his crime without a warrant, would be to leave society, to a large extent, at the mercy of the shrewdest, the most expert, and the most depraved of criminals, facilitating their escape in many instances.

The peace or prohibition officer having the right to arrest and search for the weapons, tools, instruments, and tokens of the crime, and this with or without a warrant, should there be any distinction made in the instruments and tokens of the crime found by the officers? Should written documents be more sacred and have greater immunity than the mute evidence? Is not allowing in evidence the mute instruments and tokens—really the "*effects*" of the criminal, which he has left in his wake—as much compelling him to give evidence against himself, as though the instrument or token were a written document. The knife or the revolver of the hired assassin may be given in evidence, but if a letter is found on his person, offering him a reward for committing the crime, that would, according to the rule in some cases, be excluded as in violation of the Fifth Amendment. But for a milder illustration take this case: A law makes it a crime for an executor or administrator to make a false or faudulent final account. He is indicted for this crime, and on the trial the final account made by him and filed in the Probate Court is offered in evidence, might it not be held, under the spirit of the Boyd case, inadmissible in evidence on the ground that it violated the Fifth Amendment? Would there not be some analogy to the case of the *certified invoice?*

As a matter of fact, the chief purpose of the Fourth Amendment was to do away with general warrants. The rest of the Amendment was already the accepted common law of the land.

So the Fifth Amendment, as far as it relates to not compelling the defendant or alleged criminal to be a witness against himself, was to do away forever with a practice then and now prevailing on the Continent of Europe and which had to some extent prevailed, and was even then prevailing, in England, and which prevailed in a full measure in Scotland, to-wit: compelling the alleged criminal in the very first instance to undergo a right personal examination, continued from time to time, to extort a confession. In fact, in earlier times, both on the Continent and in Scotland, he was "put to the question by torture."

It was for the purpose of forever doing away with the practice of compelling the alleged criminal

to undergo a personal examination. Mark the language of the Amendment: "Nor shall he be compelled . . . to be a *witness* against himself." In other words, that he should not be extorted as a witness under the Continental system. See Twining vs. New Jersey, 211 U. S., 78.

As there are some courts that seem to hold that under the Fourth Amendment no search or seizure can be made without a warrant, so there are some courts that seem to hold that no written or documentary evidence, found in a search or seizure, can be used as evidence, and even on this there has been some halting. The wholesome doctrine of Adams v. New York, 192 U. S. 585, seems to have been overruled in Weeks v. United States, 232 U. S. 383; Strand v. United States, 251 U. S. 15, seems to follow in the wake of the Adams case; and likewise Johnson v. United States, 228 U. S. 457. This case, too, seems to have some bearing on the Boyd case. The same may be said of Perlman v. United States, 247 U. S. 7, 15.

The case of the Silverthorn Lumber Co. v. United States, 251 U. S. 385, seems to be a relapse to the Weeks case; and even more, as it seems to overrule those cases which hold that a corporation has no immunity under the Fifth Amendment. Wilson v. United States, 221 U. S. 361.

The case of Gouled v. United States, 255 U. S. 298, in part follows in the wake of the Silverthorn and Weeks cases. The opinion of the court really implies that no search or seizure can be made without a warrant, and then it puts papers obtained by an intelligence officer and papers obtained under a search warrant in the same category.

The case of Amos v. United States, 255 U. S. 313, seems to be buttressed upon the Boyd, Weeks and Silverthorn cases, and follows in their wake. In the Gouled case the papers were obtained through the zeal and skill of an intelligence officer of the United States Army, and in the Amos case they were obtained through the permission of the wife; but in the case of Burdeau v. McDonald, 256 U. S. 465, they were obtained directly through a theft, and were held admissible in evidence. This seems to be a relapse to the Adams case, and to the rule laid down in Greenleaf on Evidence, sec. 254a.

As I said at the outset, the Boyd case has bred much confusion. But does not this arise to some extent from discriminating in favor of written documents as against other tokens, and mute evidence, of crime, and also from a departure from the rule laid down in the Adams case?

But some Federal courts have gone beyond the Boyd case and its successors. A Federal judge in a Kentucky case has lately held that an automobile carrying liquor in violation of law cannot be searched without a warrant. Every sane man must know how utterly impossible it would be to take out an available warrant against a swift-running automobile passing at high speed through the country with its load of liquor for its customers. Such ruling in cases of this kind amounts, for all practical purposes, to veto of all search and seizure. A line of automobiles engaged in such business would be as effective in supplying customers as an underground pipe line from the distillery to them would be. If there ever is a case that justifies a search and seizure without a warrant, there can be no doubt that cases of this kind are in this category.

Comparative Professional Statistics

AN advance extract from the Eighteenth Annual Report of the President of the Carnegie Foundation gives some interesting comparative professional statistics. Figures for the year 1920 show 122,519 lawyers in the country, including judges and justices, as against 150,007 physicians and surgeons, including osteopaths; 127,270 clergymen and 64,660 civil engineers and surveyors. In the decade ending in 1920 there was an actual increase in the number of lawyers of 7,815, or 6.8%; a decrease in physicians and surgeons of 1,125, or .7%; an increase in clergymen of 9,252, or 7.8%; an increase of civil engineers and surveyors of 12,627, or 24.3%. The following figures give the number of members of the professions above mentioned to each 100,000 population in 1920: Lawyers, 116; physicians and surgeons, 142; clergymen, 120; civil engineers and surveyors, 61.

The publication also gives a resumé of changes in bar admission rules since the last annual report. No state except Kansas at present (October 1, 1923), the reports says, conforms in the matter of bar admission rules to the standard of general education set by the Washington Conference on Legal Education, "and the great majority do not call for even a preliminary high school education. Only four states have increased their minimum requirements during the year. Montana demands the equivalent of two years of college, but not necessarily before the beginning of the period of law study. Ohio had greatly stiffened its requirement of a high school education, notably by making it preliminary to the period of law study, and by coupling it with a registration provision applicable to all the residents of the state wherever they may be prosecuting their legal studies. Pennsylvania has long required applicants, before beginning their law studies, either to show by examination that they have a general education roughly equivalent to that furnished by high schools or to present evidence of having secured an acceptable academic degree. Applicants registering on the basis of the preliminary examination, but not degree holders, have been required to show a certain knowledge of Latin. The Latin requirement has now been increased, and must be satisfied by everybody. This is the only state that positively requires any knowledge of Latin. Finally, Louisiana has begun to require a high school education."

In the field of law schools there has been greater progress than in that of bar admissions, and the report gives tables showing the requirements at the present time by the various schools. The part of the president's annual report referred to here was written by Mr. Alfred Z. Reed, whose study on "Training for the Public Profession of the Law," published in 1921, was such a notable contribution to an understanding of conditions.

Why Blame the Lawyers?

"In the United States, as in Great Britain, the lawyers have been foremost in the demand for an improvement in the method of conducting litigated cases in the interest of greater economy and expedition in time and money. Yet their efforts have been nullified by laggard legislatures and unappreciative governors, who were unable to grasp the significance of things that they do not understand. The lawyers want an improved procedure and should not be censured because they cannot get it. The blame should be placed where it belongs."—San Francisco Recorder.

THE LAW OF AVIATION

Legal Problems Confronting Country Are Obviously International as Well as National and Local—International Essays in This Field—Land Owner's Rights and "Freedom of Innocent Passage"—Question of Constitutional Amendment—Authority Against Claim of Maritime Jurisdiction—Growing Literature of Aeronautics*

By EDMUND F. TRABUE
Of the Louisville, Kentucky, Bar

AN article in "The Living Age," December 2, 1922, entitled "Forecasts," by Richard Nikolaus Coudehove Kalergi, declares:

> In the distant future, when our World War has ceased to interest more than a few dusty historians, our century will be remembered as the date when man first began to fly.

From "Current Opinion," June, 1923, page 656, we read:

> And thirteen years ago when Glenn H. Curtiss flew from Albany to New York, he was accompanied by special train. He made three stops and it took a full twenty-four hours to cover the distance of 137 miles, but the nation followed with admiration this thrilling feat. Now, luncheon in Hempstead, Long Island, and their next noonday meal in San Diego, California, is the latest aerial achievement for two United States Army officers.
>
> The flight was 2,700 miles in less than twenty-seven hours without a stop and made by Lieutenant Kelly at the wheel and Lieutenant Macready in the cockpit of the machine, driven by Liberty engine.

Air transportation has indeed assumed such proportions that it not only promises to supersede all other rapid transit, but possibly to supersede most other instrumentalities of war. It played an immense part in the World War, becoming, for some purposes, indispensable, and we now find foreign governments eager to increase their fleets of battle planes and other air equipment. What will be the course of the United States in peace and in war?

The problems of aeronautics are doubtless unpredictable. Not only have we the question of the right to navigate the air, but the many questions of how to navigate it. The question of regulation of air transportation, and of jurisdiction of governments confronts us. Because of the novelty of the subject, the unsettled condition of the law and the inaccessibility of literature on the subject, it is difficult to prepare a satisfactory paper.

The aeronaut travels at such an altitude, covers a space so unrestricted, and starts and lands under conditions so unusual that it is next to impossible to apply to air transportation the laws of land or sea travel.

Land travel is upon definite routes. Its highways are made over public or private lands, and compensation for their taking is made to landowners under the law of eminent domain.

Travel by sea is on water owned by nobody. Air travel, though, is over land of private persons, and the task of locating routes of travel and compensating owners of lands beneath would be exceedingly difficult. Land transportation is regulated by the government ruling the land, ocean transportation by the countries whose nationals own the sea craft, or by international law, but the problems of aeronautics are not soluble by the laws of land or sea transportation.

Furthermore, land taken for a railroad or highway is accurately demarcated, but how must the air space above be gauged if it must be condemned under the law of eminent domain? If a lane be laid out, how may the aviator be confined to it? He soars so high that he could know his whereabouts only through the compass, and he is often the sport of the storm, and he is confronted by clouds and fog which may lead him far astray. Expert aeronauts say that even the compass is an imperfect guide because of motor and magneto proximity, and that when the aircraft moves with the wind, there is no way of defining the drift and direction of the gale.

These reflections apply if eminent domain must be invoked, but many emphatically deny private ownership in the superincumbent air space. They contend that the landowner's proprietorship extends only for such a distance as may be needed for the complete use of the land beneath, and that the air space above is at the government's disposal.

Either theory, of course, raises questions of superiority of right as between landowners and aeronauts, because if the landowner has proprietorship of the air to any extent, such extent must be subject to determination by government.

Obviously the legal problems confronting us are international as well as national and local. Inasmuch as international law falls far short of the sudden emergency arising out of air transportation, the international phase of the subject must be settled by convention.

In 1902 an aerial code was formulated at Paris by Fauchille, and it has become the type of subsequent codes. Conventions have since been held at Paris in 1910, at Geneva in 1711, and at Frankfort in 1912 or 1913. The intervention of the war interrupted international consideration of the subject until 1919.

Balloons were used for reconnaisance in Napoleonic wars, and for reconnaisance and escape from siege during the Franco-Prussian War (1870), but aerial transportation as now understood appears to have been first seriously considered in 1899, and in 1902; Arthur K. Kuhn, American Journal of International Law, Volume 4, pp. 107, 112, 118, 129. The history of real air transportation, therefore, virtually begins with the present century. Kuhn says:

> Barring the fancied flights of Icarus (which indeed left no impress upon the *jus gentium* of the ancients) taking the air did not appear as a medium of travel until three centuries ago. From that time to the present, the means were so primitive and the accomplishments so insignificant that no questions arose except such as were quite independent of national rights in the air space.

At the conventions aforesaid one of the most prominent controversies was whether the upper air

*Address delivered at 1923 Annual Meeting of Kentucky State Bar Association.

space subject to air travel was free, like the ocean, or subject to the sovereignty of the government ruling the land below. The so-called "freedom of the air" was apparently the far more popular theory at first, but during the World War it was determined that the government ruling the land would always claim sovereignty over the superincumbent air in time of a crisis. It is probably now settled in favor of the claim of sovereignty. Accordingly, air transportation must be in accordance with international law, international conventions, and National or State laws, as must be transportation by land or sea. In the United States, therefore, air transportation *intrastate* would be subject to State regulation and transportation *interstate* to federal regulation, to the same extent as land transportation.

States might, doubtless, act on air transportation as they now act on land transportation in the absence of federal regulation, but, conversely, the Federal Government might act on air transportation as it now acts, or has the right to act on land transportation. Minnesota Rate Cases, 230 U. S. 352; Shreveport Case, 234 U. S. 342; Wisconsin Passenger Rate Case (Fed., 1922), 42 S. C. Rep'r 232, 257 U. S. 563, 66 L. Ed. 236, etc.

The opinion seems current that the principal regulation of air transportation belongs to the federal, rather than the State government, and this is correct.

International agreement, or treaty, is indispensable to international air flight, because one nation need not recognize another's regulations except as required by international convention, international law or comity of nations, and international law and comity do not adequately reach the novelty of aerial transportation. Maritime law is the growth of centuries, but aerial travel is novel and cannot wait on slow growth.

The subject of aeronautics has been much discussed in able articles; see "The Beginnings of an Aerial Law," 4 American Jour. Int. Law (1910), 109, by Arthur K. Kuhn; "The Law of the Airship," 4 Amer. Jour. Int. Law, Jan. (1910), p. 95, by Simeon E. Baldwin; Dr. H. D. Hazeltine, Professor International Law, Cambridge, England, Report International Law Asso. (1912), p. 261; "Sovereignty of the Air," by Blewett Lee, 7 Am. Jour. Int. Law (July, 1913, p. 471); Sir Earl Richards, Rep. International Law Asso. (1913), p. 522; "Air Space Rights," Carl Zollman, 53 Am. Law Rev. (1919), p. 711; "Liability of Air Craft," Carl Zollman, 53 Am. Law Rev. (1919), p. 879; "Government Control of Air Craft," ibid, 897 (1919); Blewett Lee, XXXIII, Harvard Law Rev. (Nov., 1919), p. 23; Dr. H. D. Hazeltine, Rep. Int. Law Asso., 1920, p. 387, et seq; Prof. J. E. G. Demontmorency, University of London, British Year Book, International Law, 1921-1922, 167; A. Pearce Higgins, ibid, 1922, 1923, 182; McCracken, Vol. LVII, American L. Rev. (Jan.-Feb., 1923), 97; "Air Service Information Circular (Aviation)," Vol. II, No. 181, Feb. 26, 1921; American Bar Asso. Rep. (1921), Vol. XLVI, pp. 498, 530, etc. The text of the draft of the International Flying Convention, as adopted by the Peace Conference in 1919 (Senate Document No. 91, 66th Congress, First Session, quoted at length by Mr. Blewett Lee, Vol. XXXIII, Nov., 1919, p. 23), and the English Air Navigation Act of December 23, 1920 (The Law Reports, Statutes 58, 1920), are probably the best types of an international agreement on the subject, being not only much later than previous conventions, but based upon conditions subsequent to the World War.

On the controversy between advocates of the "freedom of the air" and "air sovereignty." Doctor Hazeltine says (I. L. A., 1920, 387) that the Paris Conference of 1910 drafted an International Convention, but that it never became effective "owing to a vital difference of opinion at the conference on the question as to whether the principle of aerial freedom or the principle of aerial sovereignty should be the basis of the convention, and, hence, of international law." He says that the air convention of October 13, 1919, is now the legal basis of international air navigation in time of peace. He cherishes the hope that all nations may adopt it. (The United States Senate has not ratified it.) He notes that the basis of the convention is that:

> The contracting States recognize that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters.

He adds:

> The long pre-war controversy between the advocates of the doctrine of air freedom and those who held to the doctrine of air sovereignty may now be viewed as finally settled. But the aerial practice of belligerent and neutral States during the war demonstrated conclusively that in times of crises, States assert their full and absolute sovereignty in the air spaces above their territories and territorial waters. . . .
>
> It should not be forgotten at the present time that the International Law Association adopted the doctrine of air sovereignty at the Madrid meeting in 1913. Indeed, this association is the only one of the several leading societies of international jurists which held this view in pre-war days, and its service to sound doctrine should now, in the hour of triumph of air sovereignty be recognized.
>
> The recognition in Art. 1 of the Air Navigation Convention that every State has "complete and exclusive sovereignty" in the air space above its territory and territorial waters destroys in four words all theories of aerial freedom and all theories which limit sovereignty by a servitude of innocent passage.

Dr. Hazeltine notes that the convention allows under conditions and regulations

> the innocent passage through their (signatories) air spaces to the air craft of the other contracting States.

He emphasizes (p. 392) that the "freedom of innocent passage" does not recognize "freedom of the air," but says,

> Both the doctrine of the "freedom of the air," and the doctrine of a 'servitude of innocent passage" are based upon the conception that foreign air craft have a right to pass through the air space above the territorial surface of a State without the permission and even contrary to the will of such State. . . . The "freedom of innocent passage" accredited by the contracting States in Article 1, is merely a temporary and contractual right in the nature of revocable license.

Dr. Hazeltine explains (p. 393) that the right of "innocent passage" does not expressly include "a right to land," although he ventures the assertion that it is *implied* otherwise. The right to "innocent passage" is a right similar to that prevailing in territorial waters.

Mr. Blewett Lee (1 Am. Jour. Int. Law, July, 1913, pp. 472, *et seq.*) reviews the authorities on the "freedom of the air" and shows the English authorities opposed, and that they assert that the same reason which gives to States the sovereignty over the belt of the high seas adjoining their coasts, *viz*: that it is necessary for the protection of their territories, requires that States should have full sovereignty over the air above them because the presence of any vessel overhead is a source of danger to the land beneath. He cites a German writer, Dr. F. Meili, and M. Fauchille, to the contrary, however. He states them to be in accord

with the conclusion of the Institute of International Law that:

> The air is free. States have over it in time of peace and in time of war only such rights as are necessary for their protection.

This was said in 1906. See Mr. Lee's article in 1919, on the post-war situation, mentioned *supra*.

Notwithstanding the preponderance of expert authority, therefore in favor of "freedom of the air" before the World War, it may be regarded as now settled that the sovereignty of the air belongs to the States to the same extent that the sovereignty over territorial waters so belongs, and that the right of "innocent passage" in the air is recognized as existing subject to revocation.

Air sovereignty, of course, implies the right of regulation of air transportation analogous to governmental right of regulation of land transportation; and, also the right to adjudicate upon the respective rights of landowners and of air craft. The discussion of this point has hinged on the maxim, *cujus est solum ejus est usque ad coelum et ad inferos*. The controversy is between the claim that the landowner has ownership strictly *usque ad coelum* and the claim that his ownership extends only so far upward as the necessities and the protection of his land require.

If the landowner's property extends *usque ad coelum*, then he may prevent airship transportation over his land until the right of such transportation shall have been obtained through eminent domain and the payment of compensation for the servitude. If, on the other hand, the landowner's right extends only so far upward as the necessities and protection of this land require, the State may, without compensation to him, recognize the right of air transportation, and regulate it.

When we consider the necessity of recognizing air transportation and the difficulty of adjusting the landowner's rights if they extend *usque ad coelum* the chances of the landowner's superior rights seem quite remote.

It would seem impracticable to administer compensation to every landowner over whose land a plane might fly. Consequently, to apply the doctrine of eminent domain, it would appear necessary to establish air lanes. Accordingly, it would be necessary to confine airships to the established routes. The difficulty of so doing is apparent when we consider that the aeronaut may deviate from his route inadvertently, and oftentimes even without discovery; or may be driven by storm, or fog, or clouds, without his knowledge; or he may be so far aloft that close pursuit of his route may be impracticable. It appears, therefore, that the "freedom of innocent passage" with governmental acquiescence has the better chance of winning.

Constitutional Amendments

A question vehemently discussed in this country is whether we should attempt to obtain a constitutional amendment giving the Federal Government legislative power over air transportation similar to that which it exercises over maritime transportation, or attempt to legislate without it. The Committee on Aviation of the American Bar Association stoutly maintains the necessity for the constitutional amendment. So does Major Elza C. Johnson of the army, legal adviser to the air service, while others as stoutly maintain the contrary; see Report Am. Bar Asso., Volume XLVI, 1921, 498, 530. It is worth consideration if, without constitutional amendment, a sufficient air service bureau, or other body might not be created which would temporarily meet the exigency.

The conference of delegates from State and local bar associations at Boston, September 2, 1919, resolved to appoint a committee to investigate aeronautics, and expressed the sense of the conference that aeronautics and aerography

> should lie within the admiralty jurisdiction of the United States and should be entertained accordingly.

The Committee of the American Bar Association elaborately controverts the claim that maritime jurisdiction covers aviation. They say:

> Many persons interested in the practical development of flight through the air have no conception of the existence at the threshold . . . of a constitutional problem arising from this division of power; they are impatient of our apparent inaction; and practically with one accord they appear to look to the National Government for relief; they see other governments active with international conventions and national laws, and cannot and do not care to comprehend why any one hesitates to believe that the powerful Government of the United States has not every power which any other government exercises to promote and regulate air flight. . . . (p. 501).
>
> They see that the problem of flight is peculiarly a problem of uniform law, and they naturally look to the unitary source for a uniform law. They cannot conceive that one National Government and 48 State Governments can legislate efficiently for the one subject matter, flight and its incidents. . . . They reason that unity of fundamental control is obviously essential and that any nation which is so organized as to preclude this, or to admit of confusing interference of rule, cannot properly compete in the race of aeronautic development. . . . But having stated their point and made their argument apparently upon a base of economic truth, they concede and indeed insist as a matter of economic necessity and essential reality that the United States has the power, instead of merely urging that it should have the power.
>
> Constitutional problems . . . make no appeal to those who are impatient to see the actual commercial development of air flight and who recognize, or think they recognize, its possibilities . . . (502).
>
> There are those who maintain that air flight is comprehended within admiralty and maritime jurisdiction of the United States (Const., Art. III, Sec. 2).

If the admiralty and maritime jurisdiction of the Federal Government could be established the difficulties of jurisdiction would be probably solved, for such jurisdiction has shared the growth which the Commerce Clause has enjoyed, and the admiralty and maritime jurisdiction of the Federal Government is exclusive of the States and is not limited like the Commerce Clause to interstate commerce. The Constitution declares, Art. III, Sec. 2:

> The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction.

Authority at least, however, if not reason also, is against the claim of admiralty and maritime jurisdiction. True, Mayer, D. J., on a Libel (Sou. Dist. of N. Y.), held that maritime law applied to hydro-aeroplanes while afloat in water, or as capable of such flotation (A. B. A. Report XLVI, 1921, page 504), but the only two decisions of which I have knowledge hold that maritime law is inapplicable to aeroplanes.

In The Crawford Bros., No. 2,215 Fed. 269, Cushman, D. J., on a libel for repairs to an aeroplane, Held: That admiralty had no jurisdiction. He said:

> It is conceded, by counsel for libelant, that there is no precedent for this proceeding, but it is contended that, as jurisdiction in admiralty has, in the past, been extended to meet the needs of commerce and the questions arising therefrom, in the face of this new need the jurisdiction should grapple with the questions arising out of navigation of the air, and not await legislative action.
>
> Familiar instances of the growth or evolution of the admiralty jurisdiction are pointed out: The adoption of navigability as the test of jurisdiction, rather than confining it to the ebb and flow of the tide; its extension to

include steam vessels upon their advent, holding floating elevators, dry docks, rafts, and submarine vessels subject to the jurisdiction; the giving of a maritime lien for personal injuries, as well as one to the stevedore. The progress thus shown, it is asserted, warrants the court in assuming jurisdiction of this cause.

The Court remarks the International Juridic Committee on Aviation, organized at Paris in 1909, and recites its action, saying:

That the Committee in 1910 made an outline of a legal code of the air, that the Committee consisted of jurists, lawyers, and legal students in France and French Colonies, several States of Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, United States, Italy, Monaco, Netherlands, Argentina, Russia, Switzerland, Turkey, Sweden, Great Britain, Scotland Canada, and Egypt.

That an executive committee makes general studies upon a point of law and issues preliminary decisions to National Committees which report back their opinions which are harmonized so far as possible. That the text thus decided upon is definitely passed at annual Congresses, which have been held at Paris in 1911, at Geneva in 1912, and at Frankfort in 1913.

The court remarks a striking similarity between the provisions of the air code and maritime rules. The court, however, concludes that "in the absence of legislation conferring jurisdiction none would obtain in this court," and remarks that "action of the juridic committee on aviation manifests a recognition of the fact that legislation is necessary for the regulation of air craft. They are neither of the land or sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime."

In Reinhardt v. Newport Flying Service Corporation, 232 N. Y. 115, 133 N. E. 371, an order of the appellate division affirming an award of the State Industrial Commission in favor of a claimant under Workmen's Compensation Act to recover compensation for injury received through a hydro-aeroplane was reversed.

Claimant had care of the plane moored in navigable water in Brooklyn. It traveled between Brooklyn and Florida. While moored at Brooklyn it began to drift and claimant waded into the water to turn the plane and was srtuck by the propeller. If the plane was a vessel, admiralty jurisdiction excluded that of the State Commission. The court remarked:

> The latest of man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. Riding at anchor is a new craft which would have mystified the Lord High Admiral in the days when he was competing for jurisdiction with Coke and the courts of common law. . . . We think the craft, though new, is subject, while afloat to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of the admiralty. Any structure used, or capable of being used, for transportation upon water, is a vessel. . . . All that remains is to ascertain the uses and capacities of the structure to be classified. . . . It includes a canal boat drawn by horses . . . ; a bath house upon floats . . . ; a raft . . . ; a scow . . . ; a dredge . . . ; a temporarily sunken drill boat . . . ; anything upon the water where movement is predominant rather than fixity or permanence . . . ; a hydro-aeroplane, while in the air, is not subject to the admiralty (The Crawford Bros. (D. D.), 215 Fed. 269), or so, at least, we may assume, because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction. A hydro-aeroplane, while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation. Such a plane is, indeed, two things—a sea plane and an aeroplane. To the extent that it is the latter, it is not a vessel, for the medium through which it travels is the air. The Crawford Bros., *supra*. To the extent that it is the former it is a vessel, for the medium through which it travels is the water. If a sea plane, incapable of flight, breaks its moorings and causes injury to man or ship, there will be a remedy against the offending *res*. If, moving upon the water, it becomes disabled, and is rescued on the high seas by ship, it will be subject to a lien for salvage. We think the jurisdiction of the admiralty is not less where the structure found afloat is sea plane and aeroplane combined. It is true that the primary function is then movement in the air, and that the function of movement in the water is auxiliary and secondary. That is, indeed, a reason why the jurisdiction of the admiralty should be excluded when the activities proper to the primary function are the occasion of the mischief. It is no reason for the exclusion of jurisdiction when the mischief is traceable to the function that is auxiliary and secondary.

The court notes that its conclusion is in accordance with the practice of the Government requiring sea planes or hydro-aeroplanes to be registered as vessels, etc., and cites the report of the American Bar Association, cited supra. This case is reported with annotation in 18 A. L. R. 1324, 7. These two decisions manifest how unsafe it would be for Congress to base aerial legislation upon the assumption of the applicability of the admiralty and maritime clause of the Constitution. They demonstrate, too, the importance of a constitutional amendment conferring upon the Federal Government jurisdiction over air transportation similar to its martime jurisdiction; but it does not follow that all legislation, State or Federal, must await a constitutional amendment.

The Committee of the American Bar Association (p. 506), remark the unanimous judgment of practical men that

> the demands of progress require a uniform law operative throughout the country and emanating from a single source of power

and that

> It may appear expedient in the early stages of the art, and until otherwise demonstrated by experience, that many features or regulation of peculiarily local interest shall be suffered to be locally regulated; a method which finds analogy and illustration in the early history of a cautious exercise of the congressional power to regulate interstate commerce.

Observation of the regulation by the Federal government of interstate commerce and by the State governments of intrastate commerce, and the growth thereof, and of the tendency of judicial decision toward the predominance of Federal regulation show that legislation may go far toward assisting aerial transportation, and that as State regulation may be found insufficient, Federal regulation may supplant it, as in commerce upon land. Undoubtedly a constitutional amendment extending to air transportation Federal jurisdiction substantially co-extensive with the maritime jurisdiction of the Federal Government is very desirable, and we agree with the American Bar Association Committee that such an amendment should be broad and comprehensive, but such an amendment would not solve all our difficulties, unless an unusual effect were accorded to it, for the amendment would no more overcome the private landowner's proprietorship of the overlying air space than could the commerce clause if the landowner has ownership *usque ad coelum*. Unless a constitutional amendment expressly deprived the landowner of ownership in the overlying air space, the landowner's private property *usque ad coelum* would remain intact if such right really exists.

Mr. Wm. P. MacCracken, a prominent lawyer of Chicago, says (Am. Law. Rev. Vol. LVII, No. 1, p. 99):

> Judge Lamb, former solicitor for the Department of Commerce, has suggested a statutory condemnation by act of Congress of all the air space over privately owned

property, giving the owners a right of action against the United States for any actual damage they might be able to prove.

He adds:

As it would be impossible to prove actual damages, the net result would be that the right would be acquired without expense to the government.

The proposal thus attributed to Judge Lamb suggests probably the greatest difficulty attending a solution of the problem of air transportation, because the contemplation of condemnation in the usual way of the overlying air space covering all privately-owned land in the United States is staggering. Judge Lamb's proposal is the only one contemplating such condemnation that has come to our notice.

Practical observation of condemnation proceedings indicates that in order to condemn for use of air craft a route must be established and a lane for travel laid out. The bare suggestion of this raises great difficulties, for condemnation for such a thoroughfare would be a proceeding of such immensity as to deter its undertaking. The thoroughfare could not be traveled exactly except by the compass, and then only in favorable weather. The thoroughfare would become overcrowded and danger of collision result. The escape from danger, therefore, through the opportunity to cover a wider expanse of air would either be taken away or the thoroughfare ignored.

What hope, then, is there for us? The United States will not always remain out of the game. She will not, and should not, ignore nor trample upon private rights, but fortunately the assumed right here involved has never been adjudicated nor directly recognized, but it has been questioned with great force; see discussion on "Air Law," by Wm. R. McCracken, cited *supra*, p. 97, *et seq.*, Vol. XXXII, Harvard Law Review, p. 569; Vol. XLVI (1921), Rep. Am. B. Asso., p. 511; Report of Aviation Committee of the Thirtieth Conference of the International Law Asso., p. 336; British Year Book of International Law, 1921-22, 167, *et seq.*, etc.

The American Bar Association Report (p. 511) notes the well-known exception to the private right in land that in the early history of the law of the road the right in land was subordinate to the public right of travel to such an extent that—

If a highway was blocked, it was a part of the public right of which a traveler by the highway might avail himself as matter of individual right, to use the adjoining private property even to the extent if necessary of trampling down the growing crop in order to persist in the journey; and so, in a legal sense, the road is the journey, and not merely a fixed location within definite boundaries.

Mr. MacCracken (p. 97) quotes Lord Ellenborough in Pickering v. Rudd, 4 Camp. (Eng.) 219, as follows:

Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of *trespass quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage.

Of course, Lord Ellenborough's meaning was that to hold the aeronaut liable for trespass was *a reductio ad absurdum*.

Mr. MacCracken significantly remarks apparent public opinion in accord with Lord Ellenborough's suggestion, as air craft traveled approximately twelve million miles in 1920 and 1921 without a single property-owner's presenting a claim for aerial trespass.

Conference of Commissioners on Uniform State Law in their draft of an Aviation Act, August 7, 1922, propose:

(Sec. 3.) The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath subject to the right of flight described in Section 4.

(Sec. 4.) Flight in air craft over the lands and waters of this State is lawful unless at such a low altitude as to interfere with the existing use to which the land or water or the space over the land or water is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

Mr. Blewett Lee (Am. Jour. of Internat. Law, cited *supra*, p. 474), citing Dr. Hazeltine, says:

In regard to the right of ownership of land-owners *usque ad coelum* while admitting that various *dicta* would indicate that this right exists, he concludes that the actual decisions of the courts go no further than to hold that the landowner has a proprietary right in the lower *stratum* of the air-space, a violation of this proprietary right giving the landowner the action of trespass (p. 69).

Mr. Lee refers, also, to Sir Frederick Pollock, and to the German Civil Code and the Civil Code of Switzerland.

Governor and Judge Simeon E. Baldwin, an eminent international lawyer, says (Vol. 4, No. 1, Jan. 1910, Am. Journ. International Law, p. 97):

But has a landowner such a right in the air above his property that, even were there no franchise for it, he could complain of legal injury from the use of it for an airship voyage? In Coke on Littleton we are told that that owner of land owns upwards the "Ayr, and all other things, even up to heaven, for, *cujus est solum, ejus est usque ad coelum.*" This maxim was not derived from the nation whose language is used for its statement and, as we have seen, is foreign to the conceptions of the Roman law as to what is the common property of all. It is the production of some black letter lawyer, and, like every short definition of a complex right, must be taken with limitations.

It would seem that one of these must be that a proprietor of land cannot be heard to complain of any use of the air above it by which no injury to him can result. In other words, the law will hardly aid him by giving him a remedy in court where there has been and could have been no actual damage. His right, if any, is too tenuous for the state to care to protect by its active intervention.

Perhaps we may go further and say that he has no legal right at all over the air above his land, except so far as its occupation by others could be of injury to his estate.

Judge Baldwin notes modern tendencies; cites the German Imperial Code of 1900, and says (p. 98):

The airship is a thing of passage. It flies in a second of time from a position over the soil of one man to a position above that of his neighbor. It carries to each and to all beneath it the same menace. It imperils the public generally.

Now an injury to the public is to be redressed by an action in behalf of the public. The offender is not to be vexed with separate actions by every member of it. One is enough to settle his liability and to settle it in favor of all those whom he has wronged. Only if special damage be suffered by some particular individual can he bring an individual suit for his own indemnification.

Judge Baldwin discusses the question at length and concludes (p. 100):

The natural conclusion would seem to be that the government can permit this new use of the air, under such restrictions as are required in the public interest without invading the rights of landowners, except in case of actual and substantial damage done.

Mr. Arthur Kuhn, an able writer on international law, in the article cited *supra*, 4 Am. Jour. Int. Law, p. 123, says that the Latin maxim under discussion, *cujus est solum ejus est usque ad coelum*,

would seem rather to be the work of some gloss upon a passage in the Digest justifying the removal of projections from adjoining property over a place of burial, because to the sepulchre belongs not alone the ground enclosing the remains, but everything even up to the heavens;

"Quia sepulchri sit non solum is locus, qui recipiat humationem, sed omne etiam supra id coelum."

It will be observed that the sources of the maxim, both in the common and the civil law, do not indicate a right of property in the air or air space as such, even if this were conceivable. The principle is, by reasonable interpre-

tation, one for the better enjoyment of the *land* and refers to the air space so far as it is *appurtenant* to the land.

Mr. Kuhn remarks Pickering v. Rudd, and says that Lord Ellenborough was of opinion that it was not trespass to interfere with the column of air superincumbent upon the close, and quotes Lord Ellenborough as follows:

> But I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of *trespass quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage.

In an article by Prof. De Montmorency, of the University of London, cited *supra*, British Year Book of International Law, 1921-1922, he says (p. 167):

> It is plain, with such facts in mind, that the law of air spaces is a far more complex matter than the law of land spaces or of sea spaces. While such law naturally finds the division into which all law falls, public law and private law, yet in the case of the law of air spaces, the interactions between the two branches, though foreshadowed by sea law, promise to be complicated to a degree not yet experienced in the jurisprudence of nations. . . . In my view, the remaining jurisprudence did not contain, and never recognized the principle of the maxim *cujus est solum ejus est usque ad coelum*, which has appeared in England as a medieval gloss in the latter part of the 13th Century. It is very doubtful, if, even in English law, there is proprietary right in air space *ad coelum*. Probably no action for trespass would today lie for interference with air space of English land, beyond the reasonable height of the actual air space occupied by buildings. The doctrine of eminent domain in Roman and English law alike applies to air spaces above the soil. It may be said without fear of contradiction that any independent Sovereign State possesses full sovereignty, not merely eminent demain, in the air space over its land and that such sovereignty is unrestricted by individual rights, whether proprietary rights, or rights of travel, etc.

The article of Carl Zollman, "Air Space Rights," is elaborate and able and is very persuasive of the priority of the government's right over the claim of ownership of the landowner in the overlying air space above the region of user. He notes Chancellor Kent's decision in 1805, holding navigable the Hudson River at Stillwater notwithstanding the absence of the ebb and flow of the tide (3 Caine 307, 2 Am. Dec. 270). He notes that the landowner has never used the superincumbent air space. He cites Mr. Justice Holmes in Hudson Water Co. v. McCarter, 209 U. S. 349, 355. He remarks (p. 726) the inability of the aviator to follow exactly his course. He notes the right of navigability of water over privately-owned land, and that both water and air are navigable, etc.

Seeing that there is no precedent for holding the land-owner's right in the overlying air space superior to the Government's and that the only judicial utterances appear to be against his right, and seeing not only that air transportation was undreamed of when the maxim *cujus est solum ejus est usque ad coelum et ad inferos* originated, but that the reason for the maxim was to make complete the owner's enjoyment of his land, and that a strict construction of the maxim would result in a *reductio ad absurdum* at the center of the earth, we have a typical case for the application of the maxim: *ratione cessante cessat lex;* and, as said by Zollman (p. 735):

> A judicial determination that the existing law allows aerial navigation over private property will be far more satisfactory than any legislative attempt to so change the law as to make flying legally possible. The most carefully worded statute on this subject would probably be subject to the objections that it is taking property without due process of law, and therefore is unconstitutional.

From the foregoing it must be evident that the so-called "Freedom of the Air," championed by Fauchille and many others before the World War is supplanted by the doctrine of "Air Sovereignty." That the right of "Innocence Passage" analogous to the similar right in territorial waters, exists by international convention, or by comity, and is revocable by the sovereign of the underlying land.

That under the doctrine of Pensacola v. West. Union Tel. Co., 96 U. S. 1, the Commerce Clause extends to the new kind of transportation; and that under the doctrine of the Minnesota Rate Case, the Shreveport Case, and the Wisconsin Passenger Rate Case, cited *supra*, Congress could doubtless so legislate as to fairly well meet the emergency of aerial transportation until a constitutional amendment could be adopted conferring upon the Federal Government jurisdiction over aeronautics similar to the maritime jurisdiction of the Federal Government, and that such an amendment would be advisable, notwithstanding the wisdom of refraining from unnecessary amendment of the Constitution.

That many of the necessary legislative requirements of aviation, such as licensing pilots, and other local matters, could be met by State legislation.

That if the maxim, *cujus est solum ejus est usque ad coelum et ad inferos* establishes the landowner's proprietorship in the air space *usque ad coelum*, such property right must be condemned under the authority of eminent domain, and that because of the Fifth Amendment—an article of our Bill of Rights—any constitutional amendment destroying the landowner's right in the overlying air space would be most radical, and afford a dangerous precedent, and should be condemned, whether such property right exists or not. That the maxim is, however, inapplicable to the air space above the *stratum* which could be susceptible of use as appurtenant to the land below, but is applicable only to such air space as is appurtenant to the land.

That because of the novelty of air transportation the basis of maritime jurisdiction extending through ages, the usages of nations for centuries, is lacking, and that the reciprocal rights of nations in the superincumbent air space can be adequately regulated only by international convention.

Consequently, we should not depair in the situation, *but get busy*.

A University's Chief Function

"In a commercial sense it is true that the higher and finer scholarship does not pay. When measured by the standard of intellectual and spiritual values, on the other hand, few things bring richer reward than scholarship. Its possession is a constant source of joy and satisfaction, and the power which invisibly flows from it is of untold benefit to all men. It is a chief function of a university to seek out scholarship, to advance scholarship, to reward scholarship. Two strong obstacles in reaching these ends are the pressure for immediate practical results and mediocrity. It is hard to say which of the two injures scholarship more. Pressure for immediate practical results brings in its train intellectual slovenliness, superficiality, haste and appalling waste. It is contemptuous of scholarship with its calmness, its self-possession, its thoroughness and its patience. In similar fashion mediocrity wars upon scholarship. It mistakes footnotes for learning, lack of imagination for logic and security for consequence. The scholar works always in an intellectual space of not less than three dimensions, while both the seeker for immediate practical results and mediocrity work constantly in flat-land."—Report of President of Columbia University, 1923.

ARRANGEMENTS FOR LONDON MEETING

PRESIDENT SANER has sent the following letter in regard to the special meeting to be held in London to each member of the Association:

December 12, 1923.

My dear Sir: The Bar and the Law Society of England have invited us to be their guests next year, the Canadian Bar acting as joint hosts upon that occasion. The American Bar Association has accepted the invitation and has called a special meeting to be held in London in July, 1924, to follow our annual meeting in this country.

Preliminary announcements concerning this special meeting have already appeared in the November JOURNAL (see pages 679-680), and further information will appear in subsequent issues of the JOURNAL.

The first-class capacity (accommodations for 900 persons) of the steamship "Berengaria," the largest ship of the Cunard Line, has been engaged. This ship will sail from New York July 12, 1924. Applications have already been received for more than one-half of that space. If you contemplate going, and have not heretofore applied for reservations, I would suggest that you write, at your earliest convenience, to our treasurer, Frederick E. Wadhams, 78 Chapel Street, Albany, New York, stating the kind of accommodations desired, at the same time advising him what other members of your family will accompany you. The basic rate, New York to Southampton, will be $270 per person. An additional sum will be charged for the better accommodations, such as suites, etc. No arrangements will be made for the return trip as a body, but upon request the Committee will be glad to secure your reservations for the return passage in advance of your sailing from New York. Detailed information will be furnished by Mr. Wadhams upon application.

The bar of the three great English speaking nations will, for the first time, meet in joint session. This will be not only a notable historical event, but a remarkable demonstration of the continuing contribution of the law to the development of Anglo-Saxon civilization.

The regular annual meeting of the Association will be held on or near the Atlantic seaboard during the week beginning July 6th,—just prior to the sailing of the "Berengaria" on the 12th. The exact date and place of the regular meeting will be announced in the January JOURNAL.

Permit me to call your attention to the fact that this is a most opportune time to increase our membership. Every reputable lawyer should belong to the American Bar Association. Let each one of the present membership of 20,000 secure at least one additional member. This is your chance for patriotic service by helping to extend the growth and influence of your Association. Will you not do it? An application blank is enclosed. Please secure the signature of the applicant, sign the card as proposer, and mail it to Mr. Wadhams, who will attend to the further details.

R. E. L. SANER,
President.

For convenience of reference the announcement printed in the November issue of the JOURNAL is herewith reproduced:

AT the annual meeting of the American Bar Association at Minneapolis, Aug. 29-31, 1923, the invitation of the Bar and Law Society of England to hold a meeting of our Association in London in 1924 was accepted; and, accordingly our Executive Committee adopted a resolution which provided for the appointment by the President of a Committee on Arrangements and Transportation. Such Committee was duly appointed by President Saner and has presented a report to the Executive Committee relative to date of sailing, rates, etc.

The Committee reports that in presenting the invitation on behalf of the Bar and Law Society of England, the Rt. Hon. Sir Douglas McGarrell Hogg, K. C., H. M. Attorney General of Great Britain, stated that

> The legal sittings end here at the end of July and we would suggest that the middle of July would perhaps be a convenient time to enable us to show your members something of our procedure over here.

In order to meet the suggestion of the Attorney General, it was necessary for the Committee to select a date of sailing that would allow ample time to hold our 1924 annual meeting before the departure for London and after the national holiday July 4th. It was also necessary to select a date which would coincide with the date of sailing of a steamer that would not only provide suitable and adequate accommodations but would furnish them upon the most reasonable terms. The Committee found, upon conferring with the officials of the International Mercantile Marine Company, the United States Lines and the Cunard Steamship Company, that the above mentioned requirements were met by S. S. "Berengaria" of the Cunard Steamship Company, which is scheduled to sail on July 12th and to arrive in London about July 18th or 19th.

The Executive Committee has duly approved the report of the Committee.

The exact date and place of the annual meeting, however, have not yet been determined and will not be until the January meeting of the Executive Committee. The annual meeting will undoubtedly be held at some point on the Atlantic seaboard just prior to the departure for London.

The "Berengaria," the largest (tonnage 52,226) and one of the best appointed steamers of the Cunard fleet, provides first-class cabin accommodations for 900 persons, on all of which the Association is given an option. Her first-class accommodations are sufficient for 800 persons, two persons in each room. There are also a number of suites that will accommodate parties of three or more. There is secured for our members and their families a minimum rate, first-class cabin passage, of $270 per person, New York to Southampton. Those who desire the superior accommodations such as suites with bath and with toilet will, of course, be required to pay a sum in excess of the minimum rate of $270, such sum, however, to be determined by the Committee of the Association. This charge will be less than the regular rate for such accommodations.

No arrangements will be made for the return trip as a body but the committee will be glad to attend to all arrangements for return passage for our members on any steamer of any line.

The Committee suggests that those who desire to join in this most interesting pilgrimage to London and to avail themselves of the special rates and accommodations provided by the securing of the "Berengaria" should, as soon as possible, communicate with Frederick E. Wadhams, 78 Chapel St., Albany, N. Y., stating the number of persons in their party, of whom composed and the kind of accommodations desired. Upon application to Mr. Wadhams such further information as may be requested will be furnished.

AMERICAN BAR ASSOCIATION
JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
EDGAR A. BANCROFT.....Chicago, Ill.
JOHN B. CORLISS.....Detroit, Mich.
CHESTER I. LONG.....Wichita, Kan.
HERMAN OLIPHANT, Literary Editor.....New York, N. Y.
R. E. LEE SANER.....Dallas, Texas

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues. Price per copy 25 cents.

Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois

LAW ENFORCEMENT

III

A WORKABLE PROGRAM FOR IMPROVEMENT

Because in this series of editorials the profession has been defended from those criticisms which were founded on misapprehensions, it must not be thought that we are assuming the role of apologist. Our purpose was and is to bring about a better understanding and an increased accord between all those who respect the law and desire its better enforcement.

This brings us to the point where we must meet fair and deserved criticism with a frank admission of the defects in the administration of justice for which we are in any degree responsible.

It will be helpful at this point even at the risk of triteness to consider the function of the judicial machine, what it is for and what it is intended to accomplish.

It has been often repeated that justice is the greatest concern of man upon earth. The demand for justice is inherent in the human constitution. Children protest against injustice before they have been taught to speak the word. Indeed so universal is this manifestation that Herbert Spencer shows it to be an attribute of all gregarious animals.

The reaction stimulated by injustice is combat. In the early days of the race, men armed themselves against it and resisted it with sword and shield.

When injustice was imposed upon a clan, a tribe or a nation the only remedy was war.

The tribunals of justice were an evolution developing from the desire of man to find a method for the righting of wrongs better than the resort to force.

If judicial tribunals had not been invented and developed men would go armed today, as in the middle ages. Our present civilization rests upon justice.

If the institution of justice falls into decay, men must inevitably relapse into that ancient barbarous state from which they were enabled to emerge because of the success of the judicial experiment.

These truisms bring to the lawyer and the judge a reminder of the duty laid upon them to speed the course of justice and not to hinder it.

When the judicial mechanism operates inefficiently, those charged with its operation must overhaul the machine and see that it is put in proper order.

Like all human institutions, the administration of justice is faulty. Some of these faults are very grave.

Too many men are permitted to continue in the practice of the law after it is known that they lack the moral qualities and ethical standards which are everywhere recognized as prerequisite for admission to the bar. Men, for example, who are retained in advance by combinations of criminals, with the express or implicit understanding that they are employed to help such anti-social elements as the "pickpocket trust" in their warfare against law and order.

It is no offense to practice in the criminal courts or to specialize in that practice, but it is an offense to accept employment knowing that crimes are to be committed in the future, and that the compensation is paid for services to be necessitated by the commission of such crimes. There are too many of these "Randolph Masons." The bar and the courts cannot escape the responsibility for the disbarment and prosecution of what the Chicago Tribune has editorially called the "Lawyer Criminal."

The first step in any worth while program for the improvement of the administration of Criminal Justice is a vigorous and sustained effort, led by the state and local bar associations, to purge the bar of these unworthy members. Until this is done, progress along other lines and with other methods will constantly be hampered and the layman may be expected to entertain some incredulity at the sincerity of the plans which overlook this vital beginning.

A comparison of the statistics of the British and American Courts forces upon every disinterested student of criminal procedure the conclusion that a great part of the comparative helplessness of our law enforcement machinery is due to the fact that we have to a very large degree taken away from our judges of the state

courts their ancient common law prerogative, to sum up and comment upon the weight of the evidence in the final charge to the jury. The greater efficiency of the Federal Courts in the enforcement of the laws of the United States was, and notwithstanding the severe strain of the flood of prosecutions for infractions of the Volstead Act, still is due in large measure to the fact that the judges of the United States Courts retain these ancient powers, and exercise them.

In those state courts where oral instructions are prohibited and the muzzled judge must simply give or reject the written instructions handed him by counsel for the state and for the prisoner, the trial is little more than a game of skill between opposing counsel in which the judge plays no more substantial part than the umpire who calls "balls and strikes."

The books are full of cases where convictions have been set aside because of defects in the indictment.

The English indictment of today is as brief and clear as a cablegram, but in this country for the most part our indictments still follow the redundancy and complexity of detail of the early English practice long since abandoned in the land of its origin. Chief Justice Thompson of the Supreme Court of Illinois has shown that, without amendment of constitution or statute, a valid indictment for murder may be formulated in nine words in addition to the statement of the date and place of the crime. (People v. Corder, 306 Ill., 264.) Here is an opportunity for the immediate realization of a great improvement in criminal procedure, one which will do as much as any one thing to avoid the delays resulting from appeals, reversals and new trials. One fair trial should be accorded the accused but if the trial has been fair and free from error which can be shown to have affected the verdict prejudicially to the defendant, public interest demands that the state should not be required to try the case a second time.

Here is a workable program for more efficient criminal procedure:

1. Drive out the false priests from the temple of justice.
2. Restore to the judge his common law power to sum up the case and comment on the weight of the evidence.
3. Simplify the indictments and the whole course of the pleading and procedure.

The first of these measures calls for action by the bar associations, through fearless and earnest grievance committees, aided and encouraged by the bench.

The second requires legislative action unless the bench will resume the exercise of those powers at once and will declare that statutes which take away long established powers from the judicial department are an invasion of the judicial province and are therefore unconstitutional and void.

The third requires only to be done at once.

Have we not spent time and effort enough in the *study* of law enforcement to justify us now in *doing* something?

PRESIDENT COOLIDGE CHAMPIONS LAW REFORMS

President Coolidge's championship of the movement to simplify procedure and expedite the administration of justice, in his recent address to Congress, will naturally be received with great satisfaction by members of the Bar Association, and, in particular, by the committee on Uniform Judicial Procedure and the committee on Jurisprudence and Law Reform, which have labored so long and earnestly to secure the adoption of necessary legislation by Congress.

It is now hoped and believed that the President's attitude will give the final fillip necessary to secure the passage of measures which have been pending for several years, and have assurance of the approval of a large majority both of the Senate and the House, as shown by replies to a questionnaire sent out by the Uniform Judicial Committee, but have been held up by various tactics in committee.

The Association may be pardoned if it finds the echoes of its declarations for several years past in President Coolidge's statement that "it is desirable to expedite the hearing and disposal of cases. A commission of federal judges and lawyers should be created to recommend legislation by which the procedure in the Federal trial courts may be simplified and regulated by rules of court rather than by statutes, such rules to be submitted to the Congress and to be enforced until annulled or modified by the Congress.

President Coolidge's further timely recommendations for the revision and simplifying of the laws governing review by the Supreme Court, so as to enlarge the classes of cases of too little public importance to be subject thereto, for revision of the laws of the United States, and for a division of criminal identification in the Bureau of Investigation of the Department of Justice, are other significant parts of the message bearing on the administration of justice.

THE WORK OF CHARLES DICKENS IN AIDING CHANCERY REFORMS

OR A KEY TO BLEAK HOUSE*

By HAMPTON L. CARSON
Of the Philadelphia Bar, Formerly President Am. Bar Association

MOST readers of Dickens, particularly if members of Dickens Fellowships, are fully persuaded that their favorite author had a definite purpose in view with each book that he wrote, and that in presenting unpleasant scenes and odious characters in low as well as high walks of life he intended so to touch the public conscience and arouse public indignation as to influence Parliamentary action in redressing long standing wrongs. In no book does such a purpose more clearly appear than in Bleak House. In the Preface he openly assails the High Court of Chancery for the evils of expense and delay, but nowhere does he describe except by indirection the character of these abuses.

As most readers are unfamiliar with the conditions prevailing in the Chancery in those days, and even well informed professional men have given but little attention to their history, the writer of this paper has attempted to furnish a Key to the real meaning of the book and an exposition of the manner in which Dickens sought to arouse public sentiment in antagonism to entrenched evils and to quicken the pace of legislative reform.

Everybody has had on his or her lips more or less frequently the name of the case which has become, through Dickens' pages, a synonym for delay and injustice, the case of *Jarndyce versus Jarndyce,* but before we can realize exactly what it was that Dickens was assailing and what interests were strongly entrenched against his assaults, it is necessary to present in a brief way, and free from technical expressions except so far as necessary to a statement of the question, a view of the system of chancery jurisprudence the evils of which he declared it was his purpose to assail.

We talk, both as lawyers and as students of social institutions, about the *Common law* and the *law of Chancery* or *Equity,* as it is called, and we hear the phrase very frequently, "This is a case of common law" and "That is a case in equity." It is an arbitrary division, and difficult to explain without going into technical niceties, but let me give an outline of the theory and mode of administering English justice. As English justice is the basis of our own system, a discussion of the subject will not be remote from the studies of a Dickens' Fellowship.

According to the theory of English law, the king was not only the fountain of justice but its administrator, and in the early days he sat in the great hall, the *aula regis,* as it was called, the hall of the king, for the purpose of listening personally to the grievances of subjects which were brought to the foot of the throne. In the library of the British Museum there are ancient books which have been illustrated, and we can see impressed on the seals depicted as attached to documents, some of them very large, such as the Great Seal, and even on minor seals, or initial letters of illuminated historic pages, an image of the King on his throne, sitting in his great hall, personally dispensing justice. That is especially true of the age of Alfred the Great and of Edward the Confessor, carrying us far back, some eleven hundred years, into the dim recesses of the past, and we can trace the custom even down to the latest of the Plantagenets. The King sat personally to redress the wrongs of his subjects.

It will be readily understood that in course of time it became impossible for any human being, no matter what his strength physically or his alertness intellectually, to attend to all such business in person. He had to have some one to help him. Besides, the King would be frequently absent from his palace, engaged in wars, and some of the later kings went to the Continent or participated in the Crusades and went to the Holy Land. The King was obliged to call to his aid some wise men, the most experienced and the most sagacious in the kingdom, and such was the origin of the present Privy Council. Business naturally divided itself according to its nature into various groups. A man who was familiar with a certain line of business would take one assignment, and the man who was familiar with another line would take another assignment. For instance, if it related to a clash of arms it would go to the Earl Marshall. If it related to the king's household, some matter of household dispute among the retainers and royal servants, it would go to the High Steward or Chamberlain. If it related to revenue or to a fiscal interest of the king it would naturally go to the Lord Treasurer. If it related to a disputed question of right between subject and subject as to land or property it would go to one who had given his attention to titles, and gradually we see detaching themselves from the King's personal authority those important delegations of power which finally became segregated in the courts of justice.

After awhile, when the Chief justiciar of the Crown would go from county to county to sit as an itinerant justice with those who were locally assigned to assist him, each decision that he made would, more or less, be governed by the similarity which the case then before him bore to some preceding case. If he found that the story told by an injured man resembled in its main features the story of outrage that had been related to him by a man under similar circumstances in another county a year or so before, he would naturally re-examine the grounds of his prior decision and see whether or not it was governed by some

*A paper read before the Dickens Fellowship Club of Philadelphia.

general principle, or should be so discriminated as to circumstances as to create an exception and be qualified, thus building up little by little that series of judicial decisions which today constitute the basis of English Common Law—the law of the common people, based on custom.

After the springing up into existence of Parliament law was largely based on statutes, the oldest of which was the great Statute of Magna Charta, framed by the barons at Runnymede on the island in the Thames beneath the walls of the royal castle at Windsor, in the reign of John. That system, as can well be imagined, would naturally in the course of time become more or less technical in its character. A rule of law would become fixed, which should not be departed from, because the administration of justice in the long run must exhibit steadiness, equality, uniformity, universality. There cannot be personal caprice in the administration of justice. A judge is not at liberty to do what he thinks best under the circumstances. He must be governed by some fixed rule of law, and he naturally looks to the decisions of his predecessors given under similar circumstances, or discussing similar principles to the one then under discussion, in order that his view may be that of a righteous rule, applicable to everybody, high and low, rich and poor, powerful or hopeless and friendless. Therefore the system of the Common law to a certain extent became rigid.

Now for the origin of Equity. Applications would be made to the king for relief in some special case of hardship. A petition would be presented to the king complaining that in a certain instance the rule of law worked a hardship, and alleging that it was inequitable to enforce it in all its rigidity. To whom did the king turn? To his closest adviser, his private chaplain, who advised him as to what it was right under the circumstances to do. The royal chaplain, in course of time, became the keeper of the king's conscience, became the *Chancellor* and *Keeper* of the Great Seal, the head of the equity system, which, speaking with freedom from technicality, is "the correction of that wherein the law, by reason of its universality is deficient." In the earliest days the office of the king's chaplain or chancellor was held by high church men, not by lawyers. The most celebrated of the chancellors were bishops. We can recall their characters by mentioning a few of them, running down through centuries, because we are passing over a thousand years of history almost at a leap: Thomas a Becket, Archbishop of Canterbury, who had a fatal conflict with King Henry the Second; William of Wykeham; Archbishop Waynfleet, one of the earliest of philanthropists; the famous Cardinal de La Pole; the noble and high minded Sir Thomas More; Cardinal Woolsey in the reign of Henry the Eighth, whom Shakespeare has immortalized; Bishop Gardiner, conspicuous in the reign of bloody Mary, the wife of Philip of Spain. The first chancellor who was a lawyer appeared on the woolsack in the reign of Elizabeth, in the person of Sir Nicholas Bacon, the father of the great Lord Bacon, and from that time down to the present, with but few exceptions, the office of Chancellor has always been held by a trained lawyer instead of by a churchman. But observe this—that owing to its ecclesiastical origin there sprang up in the hundreds of years of ecclesiastical jurisdiction a mode of procedure which was entirely different from that at common law.

At common law twelve men were put into the box to serve as a jury, sworn to decide the facts according to the evidence and according to the testimony of the witnesses. They had a common law judge who would charge the jury on general principles of law. That mode of trial was speedy and it was effective to a certain extent, but it had this defect. A common law judge had to wait until some wrong had been committed, or an injury had been inflicted, before he could impanel a jury, and the only redress was the award of damages by the verdict of a jury as compensation to the injured party for the wrong that had been done. We can easily see that in many cases such a remedy was entirely inadequate. Wrong had been done, an injury had been committed, but the only redress was damages. That is what we have today on the common law side of the court, where juries are sitting and giving verdicts to an injured plaintiff, a man who has had a leg broken through the negligence of a Transit Company in starting a car before he had safely alighted or had made his entry, a verdict for so many thousands of dollars as compensation. On the equity side, however, originating in ecclesiastical practice, the remedy was one of *prevention*, by taking hold of the party before the wrong was done and thus preventing its being done. Such is the origin of what we term an injunction to restrain the performance of a threatened act, and, in order to be effective, the remedy was not addressed to the property of an individual, because damages can only be collected from property, and we cannot now take the person of a man and put him in jail in order to pay a debt. Imprisonment for debt, though in force in Dickens' day, has long since been abolished. But the Chancellor, addressing himself to the conscience as an ecclesiastic, would issue a mandate to a man, "Do not commit that act. If you do I will treat you as in personal contempt of the power of this office and I will imprison you for that contempt." That was the difference.

In course of time the system of chancery became quite as technical, as arbitrary and as unyielding on its side as the common law. In other words, the chancellors, instead of having a flexible and shifting course of justice, were governed by rules. In the old days before there were any rules Mr. Selden, a great English antiquarian, said, "What a knavish thing this equity is. What an uncertain, a random and wandering thing it is. It is all according to the chancellor's conscience. You might just as well make a rule of justice according to the length of the chancellor's foot. Some chancellors have long feet and some have short feet. Some have conscience and some have no conscience. There is no rule at all. It is a mere arbitrary thing." So it came about that scientifically there was evolved in the course of centuries regular rules for the government of equity.

By the time of the reign of Henry the Fifth the court of chancery had a definite establishment. The judicial officer in the lower rank was called the Master of the Rolls. The Chancellor sat on occasion to hear appeals from the decree of the Master of the Rolls and to hear original applications to himself. Delays, however, would creep

in, for this reason. The Chancellor was not a judicial officer detached, as was the Chief Justice of the King's Bench, to judicial duty, with no political duties to perform, but remained a member of the King's household. When he became a great law lord he was also a cabinet officer charged with political duties. Hence if the cabinet was overturned the chancellor went out of office, a new ministry was formed and a new chancellor came in, and such is the state of affairs today. Every one must have noticed how many changes there have been in the lord chancellorship. We have seen four within the last ten years, yet no such change has taken place in the office of Lord Chief Justice, Lord Reading holds his place for life as a steady common law judge, but the Chancellor goes out of office with every change of the ministry. Some Chancellors, very great as lawyers, have held the seal only for a few months. Other chancellors, because they were good politicians or because the Prime minister who held them in office was able to hold his party together and get popular support, retained the seal for years.

Lord Eldon held the seal twenty-seven years under the reign of George the Third, and it was his long administration of that office, beginning in the year 1600, and running to 1627, that put the chancery far behind in the despatch of its business. The Chancellor was too much engaged with other duties. Recollect too that the Napoleonic wars were raging during much of that time and the ministry had many questions to consider. The Chancellor was often withdrawn from Lincoln's Inn or Westminister Hall, where he was sitting as a judge, in order to attend cabinet meetings. He had also to preside over the House of Lords of which he was the Speaker. He had also to attend meetings of the Privy Council. He had also to seal all instruments which were issued under the great seal of the crown. He had to advise the King as to whether it was proper that the seal should be attached to a given document or not.

All these were causes of delay, of grievous judicial delay. In 1811, following a strong impetus of reform going forward not only on the law side, but also on the equity side, Sir Samuel Romilly, Sir James Scarlet, Lord Brougham and Rev. Sydney Smith all interested themselves in getting an additional equitable officer to assist the chancellor, and a vice-chancellor was appointed. Then there were three officers, the Master of the Rolls, the Vice-Chancellor and the Chancellor. Instead of aiding the Chancellor it really buried him under a heavier accumulation of work, because he had to sit as an appellate judge in reviewing the decisions of his subordinates, and the mass of matter that was packed up in the Court of Chancery grew greater and heavier and more embarrassed than ever.

One of the distinctive branches of equity jurisprudence was the administration of what we call the law of trusts, as when a man left a will and put his estate in the hands of trustees for the benefit of life tenants with remainders over, with portions for married daughters, portions for spendthrift sons, portions for widows durnig their widowhood, with accumulations over. All these had to be interpreted by the Chancellor, so that when a bill in equity was filed to execute the trusts the bill became an interminable instrument. It consisted of extracts from these documents. It had to be backed by long lists of interrogatories, questions addressed to numerous parties defendant to search their consciences. I want to emphasize that point. Recollect that during all this time at common law the parties to a suit could not be called to the witness stand. The plaintiff could not take the stand. The defendant could not take the stand. The theory was that a person who was interested in the result was so far discredited by pecuniary interest as to be unworthy of belief. But in chancery the application, because of its ecclesiastical origin, was to the conscience of the defendant, and hence bills became greatly enlarged by a series of interrogatories intended to purge the conscience of the defendant, asking him as to this fact or that fact and as to this matter or that matter. All these details had to be conducted through a series of motions by chancery barristers, retained and coached by the solicitors who were men who did not go into court and argue cases, but who prepared documents for the consideration of the chancellor.

It can now be easily seen that a highly technical system hundreds of years old, nearly a thousand years in fact in course of evolution, was gradually built up calling for reform, and great reformers, long before Dickens became even a name, had addressed their attention to the rectification of delays. Lord Eldon, though of a doubting cast of mind which gave him the title of "The Doubting Chancellor," was not indolent. He disposed of a vast mass of business, even though distracted by his other duties, but the delays in several conspicuous cases were so censurable that Mr. Williams, afterwards a judge, brought the matter to the attention of Parliament and kept hammering at it session after session. Eldon's immediate successor, Lord Lyndhurst, was a confirmed Tory and did nothing to remedy the appalling conditions. Lord Brougham, a radical of great energy, threw himself night and day upon the task of clearing up the arrears, but found them too heavy even for him. Lord Cottenham, a decendant of the diarist Pepys, Lord Truro, who, as barrister Wilde, had defended Queen Caroline, and Lord St. Leonards, who afterwards became the Lord Chancellor of Ireland, all essayed the task in vain!

Such was the state of affairs when Charles Dickens appeared upon the scene. But to give a graphic illustration of the conditions of that day and of what the cartoonists of those days did, let me describe an illustration in my possession which will show very clearly the shocking state of affairs existing in the law and equity courts in Dickens' day. It is a highly colored cartoon, and if any one should imagine that present criticisms of judges and courts are savage or bitter, let him but read what is printed on this sheet, and he will conclude that modern criticisms are moderate in comparison in the exhibition of public evils. This is the Title: "Law, gorging on the Spoils of Fools, Rogues and Honest Men. Folly and Knavery producing Rapine and Ruin, the fatal effects of Legal Rapacity. Designed and engraved by Peter Leon. Published in London by Thomas McLane, 26 Haymarket." There is no publishers' date, but the expert from whom I bought it years ago, tells me that it is prior to the time of Dickens, probably about A. D. 1817.

Here in the left hand lower corner is a gateway with an arch above it on which are inscribed the

words "The High Road of the Law leading to Ruin." A man is seen entering that gate, red hot with wrath. He encounters the first toll-gate which is labeled "Opinion of Counsel." He passes that and is then put into a coach and is driven across a bridge over a deep and dangerous gulf, and encounters the second toll-gate under the head of "Consultation," and he there begins to cool off a little from his zeal for litigation. The road then turns sharply to the left and he passes through four different toll-gates over which are the words "Mystery, Procrastination, Overruled, Injunction." Finally the suitor gets through and stands on the peak of a stone in a somewhat exultant fashion, with the words beneath his feet "Gained an action in the Court of Exchequer," but observe him with his pockets turned inside out and absolutely empty, while there is pouring down a stream of gold, with the monster "Law" in the shape of a great dragon at the bottom of the picture, with jaws wide open swallowing gold. Beyond and above there arises a tall column or shaft entitled "Court of Chancery." On the top of the column are the wards of chancery in a cage. A huge spider, with a head resembling the wig and features of a chancellor, is spinning a web from bar to bar, and there is a huge padlock securing the bar, and on the top of the cage asleep is a large figure of Justice reclining with her head on "the wool sack," which, as we know, is the official designation of the seat of the Chancellor. Beyond in high relief are suitors in the Court of Chancery, who are depicted in various attitudes of hopeful exclamation, of dejection, of despair and of anger at delay. Beneath them are adventurous youths who, imagining that there is a chance in chancery for the recovery of an estate then in litigation, are wooing the female wards with the words "Oh, my charmer, smile on me." On the outside a crowd of creditors denounces a bankrupt and beyond there is a select party of bankrupts on the footing of a safe and secluded parapet, carousing around a table and exulting over the fact that through the Court of Chancery they have made settlement with their creditors for a farthing in the pound. Below and to the right a plaintiff and defendant are see-sawing at a perilous balance on a sharp point of law, hovering over a gulf of despair, where a monster with gleaming red eyes is looking for victims. The journey which began as indicated, after pursuing these various courses, is terminated with an attenuated crowd of exhausted and starving litigants leaving law and equity only to find their way to the county jail, the workhouse and a city of ruin with scaffolds in the streets. Such is the cartoon, preceding the days of Dickens, and it gives us a vivid realization of the condition existing during the Georgian and early Victorian periods. Whether Dickens ever saw this cartoon, I know not, but similar conditions and similar sights were familiar to his keen eyes.

How did Dickens deal with them? We have all read Bleak House. Some people think it a dull book, and those repelled by the technical features of the first chapter may still think so, but let them persevere. If a reader will realize that the objects Dickens had in view were the abolition of the delays and the elimination of the ravenous costs of Chancery, he will find that Bleak House contains one of the most skillfully devised plots and thoroughly sustained arguments, perfect in execution, to be found in any of his books.

Take up the opening chapter with its dull November day, with fog settling down on London. Why, we feel the fog. Its chill dampness is in our veins. We cannot perceive objects moving at any distance from us. Remember it was at a time when the only lights were candles, or rude oil lamps. The mire in the street, the filth and the accumulation of rubbish unremoved, darken a most uninviting section of London, in the neighborhood of Chancery Lane and Lincoln's Inn. Now with that picture in our minds we are introduced to the Chancellor sitting in the midst of the fog, physical and intellectual, in the midst of the dirt, the dust and the despair. Dickens introduces an innumerable quota of characters, but they all, numerous as they are, play a part in this great drama of liberation.

There is poor Miss Flite, who has haunted the Chancellor's Court for over thirty years, a lunatic, with fifteen birds in cages in her room, whose liberty she denies until the Chancellor shall hand down a judgment in her favor. There are the officers and the agents of the Court of Chancery all about; mean, superserviceable creatures; the man who sells stationery and law stamps and legal forms; the homes of the bailiffs and the petty officers who serve processes; the avaricious shop of Snagsby, the sharklike character of Smallweed; the desolation and disease of Tom-All Alone's; the dangerous ruins of Cook's Court, the result of being in Chancery, with blind houses perishing with eyes stoned out, and every door leading to death; the maddened and wretched Gridley, wronged out of his estate by the interminable imposition of costs, costs, costs, and fines, fines, fines, for contesting a question entirely clear to his own mind, dying while hiding in the shooting gallery of Sergeant George, to be buried in the miserable graveyard the stones of which are swept by the street sweeper-boy Jo. Then too, there are the shifts and twists of Kenge and Carboy and Mr. Guppy. All these are charged up to Chancery. Then in the midst of his den of filth and ignominy sits Krook, the purchaser of old scraps of paper and iron and brass and stray wills, with his cat with her fierce eyes and her hostile whiskers, and that unknown man sitting above in his noisome garret, eking out a miserable living in making copies of the affidavits and the injunctions and the orders that are being issued by the Chancellor.

And who is that man? There the mystery and tragedy begin. Mr. Bucket, the detective, does a clever piece of work in gathering up the threads in order to place in the hands of Mr. Tulkinghorn, a Chancery Solicitor, the various ends which will draw a net about Lady Dedlock as the unhappy victim of a love which was not followed by marriage, in order to break down her self-possession and the esteem which her husband, Sir Leicester, had for her, thus acquiring a deadly power over her and when, through the action of Bucket, the threads are so drawn that Lady Dedlock sees that there is no escape for her from shame and infamy and the loss of the trust and confidence of her husband, she plunges into winter sleet to die under circumstances of horror on the grave of the unknown man who had copied the affidavits and injunction orders,

whose handwriting she recognized in the presence of Mr. Tulkinghorn as that of her lover, the father of her child, Esther Summerson, the heroine of the book.

It is a frightful picture. It is a demonstration of how dark colors can be used and how Dickens could depict unutterable woe. But no matter how numerous the characters, no matter how they seem to cross and recross the paths of each other, if we keep our minds alert and intent on the main purpose of the great story which sweeps resistlessly to the doom of Richard Carstone, we will find that the real tragedy of the book is not the untimely and unhappy end that comes to Lady Dedlock. The real tragedy is the way in which a pecuniary interest in the case of Jarndyce and Jarndyce sucked out the life, the substance and the hopes of one who otherwise would have been a hero, Richard Carstone, the lover and husband of Ada, the friend of Esther Summerson. There is a murder also, the murder of Mr. Tulkinghorn, but although the circumstances breed suspicion, the murderess is not Lady Dedlock. The murderess is a woman discharged by Lady Dedlock as a maid, who intends to be revenged. The victim of the book, the murdered offspring of the Chancery system, is Richard Carstone surrendering his youth, his aspirations, his ambitions, his fortune, his character, everything that he has, because he became involved more and more in the toils of the interminable litigation. He loses his sense of duty, of justice and of honor, as well as propriety, and when at last he dies with the radiance of a smile on his face, and hopefully whispers to Ada "I begin the world," Dickens, with a touch of inimitable pathos, says: "Not this world, oh not this! the world that sets this right."

There is sunshine in the book in the character of Mr. Jarndyce, that noble, broad-hearted, generous old man, who although interested in the suit never lost his humanity, never lost his love for Esther, never lost his love for Ada, but withstood all the jibes, the quips, the attacks, the assaults, the ungenerous aspersions of Richard Carstone in moments of lunacy and delusion, retaining his own manhood unsullied, unshaken and unspoiled. Sir Leicester, too, like the big-hearted Englishman that he was, forgave his wife, but alas, too late, too late.

Dickens as a literary man threw himself into the great contest for the reform of chancery proceedings, just as the other great men whose names have been mentioned had done in the House of Commons and the House of Lords; just as the author of the cartoon in 1817 had done with a similar purpose to that of Dickens. But parliamentary arguments and blazing cartoons reached but a few people comparatively. Bleak House reached thousands upon thousands, and popular opinion grew until it was possible to effect by law a reform of the system of the Court of Chancery. It was long delayed. Dickens wrote the story we are told in 1853. The Chancellor then in office was Robert Monsey Rolfe, better known as Lord Cranworth, who at the Bar had been a famous leader. He was followed by Lords Chelmsford, Campbell and Westbury, all of whom were active in pushing reforms. It was not until 1867, however, that chancellor after chancellor had left the wool sack, and attorney general after attorney general had brought forward bill after bill that a remedial act was passed and finally, in 1873, Lord Cairns secured the Supreme Court of Judicature Act which fused the Courts of Chancery and Law and abolished the abuses of delay and costs.

Thus did Charles Dickens contribute to the righting of the wrongs of centuries, and for this, as for many other services to humanity, he should be held in everlasting remembrance.

Canadians to Help Entertain in London

"But perhaps the most significant feature of the proceedings of the Eighth Annual Meeting [of the Canadian Bar Association] inheres in the acceptance by the Association of the invitation of the English Bar to assist in entertaining the American Bar Association in London next year. To do this is to demonstrate not only the fine human quality of camaraderie possessed by lawyers the world over, but that legal science is so universal in its bearings that the adherents of its diverse systems can find a common ground for cooperation in the interests of civilized society at large. Internationalism appears to be a more blessed word than Mesopotamia at the present moment, and for countries to unite in the effort to improve the whole field of law is internationalism at its best. Here, then, is an opportunity for lawyers from all parts of the Dominion to join with their American brethren in visiting a land rich in the possession of many relics of an age when the two systems of law familiar to us in Canada were struggling for supremacy there. It is a far cry from the time when Edward I. ordained that 'apt and eager' students of the law were to be settled in close proximity to the Courts at Westminster—thus laying the foundations of a distinctive legal profession in England—to the day of Bar Associations in the New World; but the intervening centuries have seen no curve of discontinuity in the road of progress travelled by juristic science in England, and both law and legal institutions on this side of the Atlantic have their roots deep in the social soil of the early days of her civilization. Hence the vividness of her appeal to the imagination of every member of our profession who has not visited her shores; and the sense of profit in yielding to that appeal experienced by those who have. The Association has done well in resolving to adventure this pleasant invasion of England."—*Canadian Bar Review, Sept. 1923.*

Standards of Procedure

In an address delivered in Washington, D. C., in 1914 before the Annual Convention of the American Bar Association, the Hon. Elihu Root said:

> "American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men and workmen. The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute, and go to him and tell their stories and accept his judgment. Of course, all practice cannot be as simple as that; but that is the standard to which we ought to try to conform rather than the methods of an acute, subtle, logical, finely discriminating, highly trained mind. It is that sort of thing which merchants seek when they get up committees of arbitration to decide their controversies without the intervention of lawyers. They are trying to get their questions settled in accordance with their instincts and habits of thought."

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Current Law Journals

TWO articles of general interest, dealing with taxation of incomes, appear in the current law journals: Prof. Joseph H. Beale, Harvard Law School, contributes an interesting article on *"Stockholders and the Federal Income Tax"* in Harvard Law Review for November. The nature of the tax is helpfully explained, and many cases dealing with forms of stock dividends and reorganizations are discussed. Under the title *"Retroactive Income Taxation,"* Charles Robinson Smith argues convincingly against the constitutionality of the proposed Revenue Bill taxing again as income the incomes reported and taxed during the war. The article appears in Yale Law Journal for November.

In Harvard Law Review for November, John W. Griffin, New York City, under the title, *"The Federal Maritime Lien Act,"* undertakes "to review the decisions under the Act and to note how far its purposes have been accomplished and its interpretation established." He has done this in a most thorough manner, and the article will be of interest to all lawyers in the Admiralty practice. An article on a related topic appears in Michigan Law Review for November. George L. Canfield, of Detroit, discusses *"The Ship Mortgage Act of 1920"* with particular reference to its constitutionality.

The finding, by the author, of "not only the original draft of the Judiciary Act as it was introduced into the Senate, but also the original amendments in the Draft Bill, submitted during the Committee and Senate debates, and, further, the copy of the Bill as it passed the Senate and went to the House," . . . "now makes it possible, by comparison with the statute as finally enacted, to write, for the first time, an accurate history of the progress of the Act through the Congress, and of the variations of the final Act from the original Draft Bill." Charles Warren, author of "The Supreme Court in United States History," has done this, in an entertaining and instructive manner, under the title, *"New Light on the History of the Federal Judiciary Act of 1789,"* in Harvard Law Review for November. "Such a comparison reveals certain legal and historical surprises of great importance, and makes it certain that Madison was wrong in stating, in 1836 (when he was eighty-five years of age and probably of failing memory), that 'it was not materially changed in its passage into a law.' It is clear now that very important and, in some instances, vital changes were made from the Draft Bill before it became law. And it may well be contended that had the Judges of the Supreme Court been familiar with these changes and with the history of the progress of the Bill in the Congress, several of the leading cases before that Court might have been decided differently." The article is of more than historical interest.

The miscarriage of justice which resulted to an American citizen, a resident in Mexico, by a refusal of American Courts to enforce her rights as administratrix, appointed by the Mexican Civil Courts, because the Mexican Government had not been recognized by our State Department, leads Edwin D. Dickinson, University of Michigan, to inquire: "Is such an attitude required by sound legal doctrine or the established precedents of the law?" and to discuss the status of *"The Unrecognized Government or State in English and American Law?"* The article begins in Michigan Law Review for November.

The University of Pennsylvania Law Review issues a supplement to the November issue devoted to an article by Louis Rojas de la Torre, on *"Mexican Business Corporations,"* designed to show "the essential characteristics in which the Mexican Law on business Corporations differs from the law in the United States." In the regular number of this journal, George W. Wickersham, New York City, tells of the formation of *"The American Law Institute"* and outlines its plans for a restatement of the law.

In this journal also appears a strong defense of the Constitution and the power of the Supreme Court under the Constitution against the attacks now being made upon them. The article by Ira Jewell Williams of Philadelphia is entitled *"Righteousness in Government."* Mr. Williams considers that "the discussion in, and decisions by, the Supreme Court of the United States, of fundamental and far reaching problems of natural justification and elemental freedom, develop a tradition of that righteousness in Government which exalteth a nation."

Under the title, *"Expedition and Economy in Litigation,"* Sir Francis Newbolt, K. C., discusses a question from the English point of view in which American lawyers will be interested. The article appears in the Law Quarterly Review for October. In the same journal C. S. Emden has analyzed and classified the English cases, bearing upon *"Documents—Privileged in Public Interest."*

Central Law Journal for November 20th contains an interesting article by Charles B. Griffith and Donald W. Stewart upon the question, *"Has a Court of Equity Power to Enjoin Parading by the Ku Klux Klan in Masks?"*

The October issue of Nebraska Law Bulletin is devoted to an article by John Mills Mayhew, M.D., upon *"Medical Experts and Insanity."* This article, written from the physician's viewpoint, will be of interest and benefit to the profession generally.

With the opening of the law schools and the reappearance of the law school reviews, the volume of current legal literature is materially increased. It is in these journals principally that concrete problems of law are treated in an analytical manner. The current issues present several such discussions.

In Michigan Law Review for November, Evans Holbrook, University of Michigan, discusses *"The Change in Meaning of Consortium,"* considering the

common law right and the right after the Married Women's Acts.

Percy Bordwell, University of Iowa, begins in Yale Law Journal for November an article upon *"Disseisin and Adverse Possession."* In the same journal, George Gleason Bogert, Cornell University, under the title *"Express Warranties in Sales of Goods,"* discusses "the common law cases on express warranties in connection with the statutory definition of express warranty contained in the Uniform Sales Act."

Maurice Finkelstein of New York City discusses *"The Plea of Property in a Stranger in Replevin"* in the Columbia Law Review for November. In this issue also appears the first installment of a carefully prepared article by Jay Leo Rothschild of New York City upon the *"Simplification of Civil Practice in New York."* The current installment is devoted to a review of judicial experiences under the Civil Practice Act.

Under the heading *"Should the Doctrine of Ultra Vires Be Discarded?"*, Charles E. Carpenter, University of Oregon, after discussing the condition of the American Law relating to ultra vires, and the grounds upon which the doctrine rests, concludes that "there is no excuse for continued adherence to the doctrine of ultra vires. It is not based upon any sound theory or demand of public policy. It results in confusion, uncertainty and unjustice in the law. Considerations of fair dealing, and freedom in business activities are opposed to it. Particular situation may demand special legislation but in general the principles of the law of agency and partnership provide a more satisfactory solution of the problem involved."

ROBERT H. FREEMAN.
Law School, University of Maryland.

II. Among Recent Books

EVIDENCE in Trials at Common Law, by John Henry Wigmore. Five volumes. Second Edition. Little, Brown & Co., Boston, 1923. The publication of the first edition of this monumental work in 1904 marked a turning point in American legal scholarship. For the first time a major subject was fully analyzed and provided with a terminology adequate to make a complete analysis possible and to express the analysis so made. Some of that terminology struck the reader at the outset as strange and, in some cases, bizarre. This impression was not due to the terminology being unnecessarily novel, for such it is not, except in rare and unimportant instances. It was due to failure fully to realize what had been happening about us in legal scholarship. The revival of legal learning beginning at Harvard in the second half of the last century took two forms. Interest in study in the field of legal history yielded rich results, as the work of Ames and Holmes, for examples, shows. The study of decisions with a view to framing a complete and consistent logical structure was stimulated and numerous small portions of particular parts of the law were worked over. But, prior to Wigmore's Evidence, work of the latter sort re-analyzing an entire subject had not been undertaken, and such of it as was done did not always proceed with a realization of the fact that a complete re-analysis, adequately stated when made, required radical changes in terminology. Wigmore did not lack the insight and courage to make those changes, and the result was his revolutionary and truly monumental work on Evidence. What Wigmore has done in a comprehensive way for evidence is still undone in other fields. In the law of contracts, for example, occasional pieces of re-analysis have been done. Thus Langdell differentiated unilateral and bilateral contracts and gave those distinct ideas appropriate distinct names. This was a contribution which has been most illuminating. However, we still muddle along with that absence of analysis as well as that paucity and deceptiveness of terminology as is suggested, for example, by the terms contract, voidable contracts, consideration, intent to contract, implied intent, and impossibility. What is true of contracts is true to varying degrees of other headings of the law. What Wigmore has done for Evidence remains to be done for other branches of the law.

The appearance of the second edition of this work is the occasion for celebrating the appearance of the first rather than for discussing the changes made. What they are can be ascertained by reading the preface to the new edition. These changes are numerous and when considered alone, important. They represent a process of perfecting this great contribution to legal scholarship. It is a happy circumstance that the author has been able to do this. These changes are trivial when compared with the monumental character of the original work.

Law and Practice in Bankruptcy, by Wm. M. Collier, 13th Edition, by Frank B. Gillert and Fred E. Rosbrook. Four volumes. $40. Matthew Bender & Co., Albany, N. Y. 1923. The new edition of this well-known and most valuable work runs to four volumes of about one thousand pages each. The text has been rewritten to a considerable extent. New headings have been added. A most valuable feature is the discussion section by section of comparative legislation and the incorporation of references to English and Canadian Textbooks. In the matter of forms to which Vol. III is devoted, the work is most exhaustive. Another notable feature is the inclusion of the bankruptcy rules of the U. S. District Courts located in the centers where bankruptcy litigation is important.

Manual of Securities Law, by Leonard L. Cowan. Corporation Maintenance and Service Co., Chicago, 1923. There are now "Blue Sky Laws" of one sort or another in every state in the Union except Delaware and Nevada. Their provisions are most varied and conflicting. To that fact add the fact that much of our financial structure for raising industrial credit is national in scope, and you have envisaged the magnitude and importance of the problem to which this book is addressed. It reproduces all of this legislation. It then classifies this legislation four ways: 1. Types of securities included in statutory regulation. 2. Kinds exempt because of the character of the issuers thereof. 3. Exemption of sellers of securities. 4. Securities exempt because of their nature. Finally the book digests all the cases relating to "Blue Sky Legislation." As a mechanical aid this volume is most valuable.

TRADE REGULATION

A Department Devoted to a Review of Recent Federal Trade Commission Rulings and of Court Decisions Relating to Unfair Competitive Practices

Combinations

ON November 19th the Supreme Court decided the case of *Bindercup v. Pathé Exchange, Inc., et al.* It involved three points, one being the legality under the Sherman Act of the concerted refusal of all distributors of motion picture films to supply the plaintiff with films for exhibition. The case came up on a motion attacking the sufficiency of the declaration. From it, it appeared that part of the distributors, from whom the plaintiff refused to rent films, for such refusal induced other distributors to refuse to supply him, in some cases thereby inducing breaches of contracts. It was held that the declaration stated a case under the Sherman Act.

As to inducing breach of contract, that act, apart from any question of monopoly, is a tort, and, when used to further the ends of the total monopoly, which the defendants were alleged to have, clearly violates the Sherman Act. Concerted refusal by the defendants to deal with the plaintiff, because he would not deal with each of them indifferently, presents a most novel situation. The plaintiff and any particular distributor were engaged not in a competitive but in a bargaining struggle. The particular distributor was in the position of refusing to bargain with the plaintiff unless he *would* deal with competitors of the particular distributor! A bargainer may refuse to deal with one if he deals with the bargainer's competitor. Cf. F. T. C. v. Gratz 1220 253, U. S. 421, 40 Sup. Ct. 572, unless it is done in concert with others to effectuate a monopoly. Continental Wall Paper Co. v. Voight & Sons Co., 1909, 212 U. S. 227, 29 Sup. Ct. 270. Should the more charitable impulse toward one's competitors help the defendant? The answer is that the position is fanciful. The distributors were not competing and the whole purpose was to apportion business among the participants in a scheme of monopoly. That has been held illegal. Fox Steel Co. v. Schoen, 1896, 77 Fed. 29. The Supreme Court thus adopts this rule which is contrary to the English rule. Wickens v. Evans, 1829, 3 Younge & J. 318.

Does a system of "clearance cards" for employes maintained by an association of employers violate the Sherman Act? In *Street v. Shipowners Association of the Pacific Court* No. 156 Sup. Ct. Oct. Term 1923, it was held that appeal from an order of the District Court dismissing a bill for an injunction to prevent the operation of the "clearance card" system lay not to the Supreme Court directly but to the Circuit Court of Appeals. The case was accordingly transferred to the Circuit Court of Appeals for the Ninth Circuit to which we may look for a decision on this most interesting question.

Competitive Practices

Excluding dismissals of complaints, there are at hand some forty decisions of the Federal Trade Commission ranging in date from May 4th, 1923, to November 15th, 1923.

In the October issue of this Journal the holdings of the Supreme Court on the legality of the *activities of trade associations* were discussed. How the Commission is interpreting the Court's position may be seen from its order issued on August 17th, 1923, in Docket No. 459 against the United Typothetae of America et als:

> That (the respondents) cease and desist, directly or indirectly,
>
> 1. From conducting its system of education in principles and methods of cost accounting in such way as to suggest any uniform percentage to be included in selling price as profit or otherwise by members or others using such system of cost accounting.
>
> 2. From requiring or receiving from members and others using respondent's uniform cost accounting system, identified and itemized statements of production costs for the purpose of calculating average, normal or standard costs of production and from publishing them to members and the trade generally as a "Standard Price List" or "Standard Guide" or association cost or price list under any other name,
>
> 3. From compiling and publishing for use by members and others in the same trade, average, normal and standard production costs with instructions or suggestions for the translation of such standard costs into selling prices under the name of "Standard Price List" or "Standard Guide" or any other name.

The Commission in deciding In Re Prichard & Constance, Inc.—Docket No. 740, July 9th, 1923, which involved the practice of *price maintenance*, seems to have gone beyond the position taken by any of the courts so far, but possibly not beyond the position which the courts will take when the matter is decided. The novel phase of the holding of the Commission on this point is found in paragraph 1 of its order to cease and desist, which reads as follows: "From employing or carrying into effect any selling policy or system of merchandising whereby respondent, through cooperation with its customers, fixes or controls, or undertakes to fix or control, the prices at which its products shall be resold by others—more particularly through any of the following means: (1) By giving or offering to give, special discounts, bonuses, or terms of sale, to jobbers or retailers conditional upon their observance of, or promise to observe, the resale prices fixed by the respondent.

The Supreme Court has condemned contracts to maintain resale prices. It has approved the mere refusal to sell to a price-cutter. It has not passed upon the giving of a discount or a bonus to a distributor not cutting prices, as opposed to contracting not to cut prices.

F. T. C. v. Utah-Idaho Sugar Company et als. Docket No. 303, October 3rd, 1923, concludes with an order of the Commission prohibiting a *combination of manufacturers of beet sugar* to keep others out of the field. The order to cease and desist contains one wholly new prohibition of doubtful validity. The respondents are ordered to cease and desist from effectuating or attempting to effectuate, a conspiracy and combination "(9) by offering to advertise in newspapers circulating in the cities of Utah, Idaho, Oregon, and Montana or elsewhere, where competitors operate or prospective competitors endeavor to build and operate beet sugar factories, with the understanding that editorial policies shall be in favor of Corporation respond-

ents as against competitors, in regard to the beet sugar industry."

A most interesting question was decided by the Commission in Docket No. 893, Nov. 5th, 1923, involving the St. Louis Wholesale Grocers' Association, a voluntary association composed of all the wholesale grocers located at St. Louis, including some twenty firms. Near the close of 1920 the sale of nationally advertised food products was sharply reduced owing to the decrease in consumptive demand for food. This left wholesalers with large stocks of goods on hand, upon which they were compelled to take a loss. The majority of manufacturers of nationally advertised food products guarantee the price of their products by allowing wholesalers a rebate or credit allowance, in the event of their lowering their selling price. Some manufacturers do not guarantee the price of their products against their own decline. "One of the effects of guarantee against decline is to offset or nullify the competitive disadvantage which a jobber with heavy unsold stock suffers as against jobbers who purchase stocks following a decline in the manufacturer's price." The Association of Wholesalers made a concerted *effort to coerce all manufacturers to guarantee their goods against price decline* under penalty of losing all or a greater part of the business in the St. Louis market. The Commission concluded that this amounted to a concerted effort to destroy the competitive advantages of those purchasing after a decline, and in consequence was an unfair method of competition within section 5 of the Federal Trade Commission Act.

A resumé of the remaining cases decided by the Commission during the period under review will give some idea of the scope of its current activity. One (Docket No. 997) prohibited inducing breach of contract, two (Dockets Nos. 875 and 1069) forbade the passing off of a product as that of a competitor, two (Dockets Nos. 861 and 931) suppressed the misrepresentation of "Wildcat" oil stock. Three (Dockets Nos. 1041-1043) contained orders to cease from dressing up packages of butter containing less than a pound so as to make them appear to contain a full pound.

An interesting group of holdings is that of Dockets Nos. 826, 827, 876 and 996, prohibiting *misrepresentation of the place of manufacture* of a product. Clothes not manufactured at Rochester, N. Y., may not be so labelled, and so of cigars not manufactured at Tampa, Fla. The Geneva Watch Company used and registered Geneva as a trade mark for watches made in other parts of Switzerland than Geneva. This was forbidden.

The Commission has handed down some twenty decisions following the ruling of the Supreme Court in the Winstead Hosiery Co. case. They prohibited, among other things, claiming Government approval when the producer does not have such,[1] publishing a bogus chemical analysis of a product,[2] selling ordinary merchandise as surplus army and navy supplies,[3] issuing old motion picture films under new titles without stating them to be re-issues,[4] misbranding celluloid toilet articles as ivory,[5] selling as genuine radium what is not radium at all, branding pens not made of gold so as to induce buyers to think them gold,[6] calling hosiery silk, soap olive, and a product shellac, when the respective products did not contain one hundred per cent of the component mentioned.[7]

Four cases decided by the Commission prohibited a distributor from representing himself to be a manufacturer when he was not such.[8] A manufacturer of sausage was prohibited from labelling his product "made and prepared by Thos. C. Phillips," a former owner of the business, when such was not the fact, the respondent not having succeeded in title to any label bearing this description.[9]

According to Docket No. 959 one may no longer advertise a free trial offer and then give, instead of a free trial offer, a trial, with the privilege of getting back the money paid for the trial.

Suit Clubs are in operation in several parts of the country, and one operating in the District of Columbia was reached by the Commission in Docket No. 1059. The plan of operating the suit club appears from the following quotation from the Commission's order to cease and desist:

> (2) Falsely representing through his agents or by or through any other means whatsoever to his prospective customers that in the sale of suits of clothing cusotmers would be divided into clubs or groups of forty-eight persons each, and that from such clubs or groups each week the name of a person would be drawn or otherwise selected by choice to receive a suit of clothing without further charge or payment.
>
> (3) From representing to customers or prospective customers that under respondent's plan of marketing his merchandise each and every customer would have an equal chance or opportunity with other customers in a selection and designation for those who were to receive a suit of clothing at a price under the full payment of $48, when in truth and in fact no equal chance or opportunity is given.

A company engaged in selling books was prohibited from using the following features in its selling plans: (1) falsely representing a cut in prices, (2) selling as leather books not so bound, (3) claiming that the book had been officially adopted by some twenty-four States, (4) offering an honorary membership in an important educational society which had no provision for an honorary membership.[10]

1. Doc. No. 975.
2. Doc. No. 1075.
3. Doc. No. 1011.
4. Doc. No. 901.
5. Doc. Nos. 973, 981.
6. Doc. No. 948.
7. Doc. Nos. 1063, 862, 924, 1014, 1055, 1056.
8. Doc. Nos. 945, 970, 972, 986.
9. Doc. No. 998
10. Doc. No. 994.

Col. Wigmore Honored

"Colonel John H. Wigmore, Dean of Northwestern University Law School and one of America's most profound jurists, has just been distinguished by appointment to membership on one of the important expert advisory commissions of the League of Nations, the Committee on Intellectual Co-operation. The Chairman of the Committee is Prof. Henri Bergson, the author of 'L'Evolution Creatice.' Its membership includes such persons as Prof. Einstein, who formulated the theory of relativity, Prof. Gilbert Murray, the world's leading Greek scholar, and Mme. Curie, the discoverer of radium. Colonel Wigmore participated in the deliberations of this Committee during a four-day session held in Geneva during August.

"Among the important matters which the Committee has under consideration is the problem of restoration of normal university life in Europe, the interchange of professors and students between European and American universities, the caring for refugee students and the adoption of a universal language for scientific and commercial purposes. At its last session, the Committee was of the opinion that the time had not yet arrived for the adoption of any artificial language."—Chicago Bar Association Record.

FUNCTION OF THE LAW IN RELATION TO DISPUTES BETWEEN EMPLOYERS AND EMPLOYEES

Survey of What Law Has Already Contributed to the Solution of Problems Raised by Industrial Relations—Two General Courses of Action Which Remain Open to Legislation—Efforts to Prohibit Warfare in Industry in America and Elsewhere—Duty to Define Industrial as Well as Political and Religious Liberty

By Murray T. Quigg
Of the New York City Bar

BEFORE attempting to define the function which law must perform in the solution of the controversy between employers and employes, it is necessary to understand how that controversy has come about, what it involves, and what the law has already done about it.

The occasion for the existing controversy between employers and employes is the fact that the application of steam and electricity to the manufacture of the world's needs has changed the environment of men to a greater degree and in a shorter time than any other change in recorded history. This change has utterly destroyed, in the great majority of enterprises, the relation of master and servant. The new relation of employer and employe is growing. However, all the facts that underlie that new relation are not yet clear. We need knowledge and appreciation of those facts, then the definition of the rights of employers and employes which those facts involve, and finally rules for the enforcement of those rights.

So far, however, certain salient facts of this new relation stand out. First, the tools of industry today are gigantic machines which cost thousands of dollars. They can only be provided in most industries by pooling the accumulated wealth of many persons. They are entirely beyond the command of the average worker. The industrial and capable journeyman can no longer take over the master's business when the master quits, or start out for himself upon the savings of ten or a dozen years of faithful labor. His opportunity to work as an artisan depends upon an offer of employment by some person or group of persons who can afford the machinery necessary for the industry. Second, the specialization of labor, which the introduction of machinery has brought about, has made it impossible for the average workman to learn how to turn out a finished article, ready for the consumer. Although his trade may be of use in many industries or as a semi-skilled laborer tending a machine he might be qualified for employment in almost any industry upon six week's training, he cannot alone make a marketable product. Thus as a result of these two facts a workman's industry, ability, and business judgment are no longer the full test of his ability to earn all that he is able to earn; but another factor—namely, the opportunity of employment at the particular work or kind of work in which he has been trained—a factor over which he has little or no control, enters into the question of his opportunity to support himself and his family. Third, the cost of the machinery, and the large scale production which its use contemplates, requires that many men shall pool their resources to purchase machinery and to buy the labor to run the machines. As a counterpoise, in order to purchase wages at a reasonable price, it is necessary for the workers to combine their labor power under a single leadership. Fourth, those who control the machinery of production dictate the management of industry. They pay the costs of production and distribution and they take the balance to themselves, which is large or small according to their business judgment and the efficiency of their management. These four, at least, are the dominating facts now apparent concerning the relations between employers and employes.

What has the law done about them so far and what has it contributed to the solution of the problems they raise? The field of inquiry divides naturally into the progress made by the development of judicial interpretation and the progress made by legislative enactments.

The common law was notoriously suspicious of all combinations. An agreement among workmen to act together in an effort to raise wages, shorten hours, or compel the employment of only members of their organization was held to be a criminal conspiracy; that is, the mere agreement to do those things, without any step taken in pursuance of the agreement, was sufficient to subject the members of the combination to criminal prosecution. But in 1842 Lemuel Shaw, then Chief Justice of the Supreme Judicial Court of Massachusetts, refused to hold that a combination of workmen to compel the employment of members of the combination only, was a criminal conspiracy. He rested his opinion upon the facts of industry as he found them. He held it to be clear even then, that unless workmen may combine to bargain collectively and may protect their power so to do by the exclusion of outsiders from the benefits of any bargain which they were able to make, there was no opportunity for the workman to hope to reach a just agreement as to the terms upon which he should render service. Since the opportunity of the workman to labor affords him his only means of livelihood, the learned judge held it entitled to the highest protection, and declared it no longer an offense against the state for workmen to resort to such device as came to hand to put them on an equality with their employer in bargaining in order to make that opportunity as valuable as possible.

Since that decision a combination of workmen in and of itself has never been held a criminal con-

spiracy. Again since that decision, a combination of workers has been unlawful or lawful according to the nature of the purpose which it had or in respect to the acts which it was committing, and such a combination has been unlawful only in so far as it took action in pursuance of its purpose and thereby wrought unlawful injury to an employer or other workmen or the public.

For a time the impression got about, even among the judiciary, that any strike is lawful. But, of course, during the past thirty years, since the strike has been used for a great variety of purposes and not as a last resort in an effort to raise wages, reduce hours, or secure reasonable working conditions, the courts have held that the purpose of a strike must be considered in determing its lawfulness.

The courts will grant relief against a contract between a combination of employers and employes which excludes other workmen or employers from following a particular trade in a particular community. It will enjoin a strike intended to secure a contract which will achieve a monopoly of the opportunity of employment in a particular trade in a particular community. Inducing a breach of contract is unlawful. The law will enjoin a strike in violation of a contract, for such a strike is a conspiracy among the members of an organization to induce the members to breach their contract. Within the past ten years the doctrine has been gaining ground that any strike intended to compel the making of a closed shop agreement is unlawful, either because such an agreement tends to monopoly or because such a strike is merely for the purpose of putting the union in a position to impose further demands upon the employers. A strike for the demands might be lawful, but a strike to put the strikers in a position to enforce the demands willy-nilly will not be tolerated.

Incidental to this right to strike is the right by peaceful means to make the strike effective. The nature of the right to picket—"a borderline right"—has been widely discussed and is pretty thoroughly understood. If the picketing is peaceful, it is lawful. But the court has wide discretion in taking such means as seems to it necessary to make certain that the picketing will be peaceful. It has generally appeared as a matter of fact that where sustained picketing is deemed necessary, if the picketing is peaceful the strike is lost. In a few jurisdictions if picketing has occurred and it has not been peaceful, the court will enjoin all picketing. Such a doctrine is anomalous since in most cases a right is not forfeited by the abuse of it; but the wrongdoer will merely be restrained or made to pay for the wrong doing. However uncertain the courts may be on the proper restraint of the right to picket, it is clear that the right exists only where there is a lawful strike and the right to picket continues only so long as the opportunity for re-employment of strikers continues. So when the factory or shop has been remanned, the strike is over and the picketing must cease.

With the development and increasing power of trade unions, the secondary boycott as a weapon in industrial warfare became most effective. The secondary boycott is an assault upon an employer in his markets wherever they may be found. The courts have held that the attempt to withhold labor from a factory in a dispute over wages and conditions in the factory may be lawful, but such a dispute can never justify an attempt to destroy the trade and good will of the products of that factory in the markets. With the exception of California which recognizes the secondary boycott as lawful, and with curious limited exceptions in other states relating to the right of building trades to refuse to work on nonunion made material, the courts are almost unanimous in their condemnation of the secondary boycott.

Incidental, but of great importance, to this development of law is the generally recognized doctrine that a strike or a boycott does irreparable injury and that where the injury is unlawful, an injunction will issue. The injunction may be broad enough to include any acts done by any person who has notice of the injunction whether the act itself be lawful or unlawful, or whether it might be the occasion of a criminal prosecution or not, if the act is done in pursuance of the unlawful conspiracy. The doctrine that all steps, however peaceful and innocent in themselves, which are part of an unlawful plot are unlawful, is not, of course, peculiar to the law of industrial disputes. It has its origin in the common law of conspiracy, but the industrial disputes have brought it into public discussion.

Coincident with the development of these doctrines by the judiciary, has grown up a doctrine of vital importance, viz. that the legislature, for the purpose of protecting the public health, morals and general welfare, may enact laws for the special protection of all wage earners, or of wage earners of particular classes. To this end have been passed employers' liability acts, laws against the payment of wages in script, laws for the proper determination of piece rates, safety laws, factory codes, and a vast amount of salutary legislation. These laws are distinct interferences with freedom of contract, but after some effort on everybody's part the courts have brought them well within the police powers. The foundation is now clearly laid for the doctrine that the workmen in modern industry need the special protection of the state against unsafe, unhealthy and unjust conditions.

Next to the doctrine of the right to strike, probably the greatest advance yet made in the new law of the employer and employe is the development of the compensation laws, which recognize that under modern industrial conditions the cost of industrial accidents and disease is a proper charge against the industry. The risks of industry are primarily under the control of the management of industry and should be charged by it to the costs of industry, a cost which must be met before dividends may be paid.

Finally we come to a class of legislation which has been enacted at the behest of organized labor for the particular advantage of organized labor. Such legislation has not fared well. Statutes have been passed by Congress and by a number of states providing that it shall be unlawful for an employer to discharge or refuse to employ a workman because he is or becomes a member of a trade union. Such laws have been held by the Supreme Court of the United States to violate freedom of contract and the equal protection of the laws. Statutes and ordinances have been passed providing that public work must be done by union labor. The state courts have condemned these statutes and ordinances as class legislation. Statutes have been passed holding

that the right to labor is a personal right and that no injunction shall issue in any case between employer and employes, or employes and employes, or employes and persons seeking employment except for the protection of physical property. Such laws have met with little success. So far as they have been limited in their wording to protect the right of peaceful persuasion, they have been held to be a mere statutory enactment of the law as it was generally accepted prior to the passage of the act. In other words, so far as they legalize peaceful picketing they are valid, but so far as they are intended to legalize the secondary boycott or strikes to prevent the employment of nonunion men, they have been held to be invalid. The right to labor and the right to access to the markets are constitutional rights which cannot be destroyed by legislation, nor may the protection of their enjoyment by a particular class be divorced from the general powers of equity. The right to labor is a property right and cannot be made a personal right because the legislature chooses to call it a personal right. It is, in many instances, the only property which a man has and it is entitled to at least the same protection that the property of the well-to-do and the prosperous enjoys.

In sum, then, the law has recognized the right of employes to organize to bargain collectively, the right to withhold labor under the control and discipline of organization, and to use peaceful methods to urge others, who by accepting employment might destroy the possibility of making the bargain on the terms of the organized employes, not to do so. The courts have enforced laws applicable to all employes, or all employes doing particular kinds of work or doing work under particular conditions to protect them against unhealthful, dangerous, or oppressive working conditions. They have upheld laws which shift the risks of industry from the employes to the employers. But on the other hand, the courts have condemned as unlawful, attempts to stifle the markets of an employer's products, or to interfere with the free access of the employer to the labor markets, or of the worker to the opportunities of employment; and they have held unconstitutional laws intended to confer special protection or advantage upon particular workmen who have organized to help themselves.

Coincident with the development of the law to this point, we find the trade unions as militant, if not more militant than ever, their leaders defiant of any restraint by law, the number of serious strikes constantly increasing, and a rapidly growing industrial unionism taking the place of craft unionism. In opposition to the union, or as offsetting its influence, employe representation in the settlement of matters directly affecting the affairs of employes, plans for employe stock subscription, unemployment funds, sick, pension, and benefit funds, and various campaigns of education among employes are supported, developed, and advanced by a number of the leading industrial institutions. They undoubtedly have a great stabilizing effect, but these efforts do not define rights or obligations on either side.

In view, then, of the increasing disorder, there seem to be two general courses of action open to the law. It may forbid collective action which causes the suspension of industrial activity, and offer in exchange therefor some arbitrary machinery which shall not merely determine the underlying principles of the relation of employer and employe, but shall fix wages, hours, and working conditions. Or it may continue, from time to time, to define the rights of employers and employes, the lawfulness and unlawfulness of methods employed in forcing bargains over wages, hours, and working conditions in specific cases, and then leave the parties to fight it out, until such time as they bring their relations into equilibrium.

The first possibility, viz. the prohibition of industrial warfare and the establishment of wage boards, is one which is at present receiving wide discussion and which has already received attention at the hands of legislatures in various parts of the world.

The most striking experiment of legislative prohibition of strikes and industrial warfare is the Compulsory Arbitration Law of Australia. It is generally agreed that it has failed of its purpose. Certain it is that the number of strikes and industrial disputes interfering with production have not decreased. Another notable effort in the same direction is the Canadian Industrial Disputes Investigation Act of 1907. That act prohibits strikes prior to investigation and report upon the controversy by a government board. The penal provisions of the act have not been enforced, but public approval of the spirit of the act is so strong that a strike of considerable magnitude, called before submission of the dispute to the public investigators, is almost certain to fail. In the United States, Congress has provided for the mediation of disputes in interstate transportation for the last twenty-five years. Statutes in the majority of our industrial states provide for public mediation or arbitration upon application of the parties to the dispute. This legislation is permissive in character and has broken down before well organized large scale strikes. Massachusetts provides for compulsory investigation of disputes which may tend to affect the public welfare. In 1915 Colorado forbade strikes in businesses affected with the public interest until the dispute has been submitted to the State Industrial Commission, the Commission has made public report thereon, and at least 30 days has elapsed from the time of the publication of the Commission's report to the day of the strike. The penal provisions of this statute were enforced against striking coal miners in 1919.

The most notable American effort is, of course, the Kansas Industrial Court Act. The Supreme Court of the United States in passing upon the power of this court to fix a wage scale in the meat packing industry, said:

> The necessary postulate of the Industrial Court Act is that the State representing the people is so much interested in their peace, health and comfort that it may compel those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State if they cannot agree. Under the construction adopted by the State Supreme Court the Act gives the Industrial Court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. . . . A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

This paragraph invites an inquiry into the definition of a strike, which the Court failed to

undertake. We speak of a strike carelessly when we speak of it as a concerted quitting of work. It is more than an organized quitting. It is an organized effort to prevent anybody from working until the demands of the strikers are acceded to. The penal provisions of the Industrial Court Law prohibit this concerted action to prevent anybody from working in the industries affected by the act. It prohibits the use of the disciplinary powers of the trade union to compel or induce its members to quit, but it does not prohibit an agreement of two or more men to quit work or seek to punish them for doing so. It offers the opportunity for a quasi-judicial determination of fair and reasonable wages, hours and working conditions. It prohibits the maintenance of concerted effort to refuse to work under the terms of the orders of the industrial court as to such fair wages, hours and working conditions. In this respect it operates as an abridgement of freedom of contract until such time as the parties to the employment relation can agree to the terms of a contract of their own making. The Supreme Court has held that in so far as this invasion of freedom of contract affects the determination of wages in a meat packing plant the statute is unconstitutional. At the same time the Court has recognized that a business may involve such a disaster to the public from stoppage that the power to regulate wages in order to prevent stoppage will exist. It seems, therefore, from this decision that the theory of the Kansas Industrial Court Act is not repugnant to our Constitution, but its application to industries where the existence of monopoly or other ground for the expectation of disaster in the event of a stoppage of work has not been found to exist is unconstitutional.

Our principal concern, however, is not with the constitutionality of specific measures, but with the task which the law has to accomplish in establishing an equilibrium in the relation of employer and employe. Whether ultimately constitutional changes will be necessary in order to accomplish this, is a question which we will reach when we know better what it is that we must do.

The last piece of legislation in this field of endeavor is the Transportation Act of 1920 establishing the Railroad Labor Board. It is clear, of course, that the state has power to regulate common carriers in the interest of continuous and indiscriminate service upon reasonable conditions and for reasonable costs to the public. It is further clear that the Constitution of the United States specifically grants this power to the Federal Government in connection with the common carriers of interstate commerce. Interference, therefore, with freedom of action on the part either of employers or employes engaged in interstate commerce is a question so involved with the special obligations of a common carrier and the peculiar duty of the government to protect the avenues of commerce from obstruction that it cannot be dealt with on the basis of private industry or of industry "declared" to be affected with the public interest.

But study of these efforts already made to prohibit strikes and to substitute therefor the determination of government boards shows that such boards do not decide anything that is conclusive either to the parties or to the public. The statute which creates these boards arbitrarily prohibits the exercise of economic power by the parties to the dispute. By mere statutory declaration or the determination of an administrative body, that a business is "affected with the public interest," the parties therein are prohibited from asserting their true economic position in relation to one another and to the industrial organization of the body politic and from achieving any advantage or acquiring any right which that position, when really understood, will give them. In place of that, the most essential question in the industrial organization, namely, what shall be paid for labor, is taken out of their hands and determined for them. Courts construe contracts or determine the rights of parties on the basis of what they have already agreed to or already done. But these so-called industrial courts undertake to decide what the parties must do and the terms upon which they must do it.

Of course when the service rendered by a particular industry is vital to the public and the industry is so placed that the public must deal with it and so situate that no one else can enter business to compete with it, as in the case of a common carrier, a gas company, a telephone company, or the like, which must in the very nature of things enjoy a monopoly within the district which it serves, it is only reasonable that all those who engage in that service from the wealthiest stockholder to the poorest common laborer should render that service upon fair and reasonable terms; and if it is necessary for the public to prescribe those terms in order to preserve the continuity of the service, it may undoubtedly do so. But so long as the capital and labor in that service may make bona fide withdrawal from the service and enter private industry, the terms upon which capital and labor are employed in the public service must be fairly competitive with the terms procurable in private industry.

When, however, the legislature, or an administrative board, declares, let us say, the clothing industry affected with the public interest merely because people require clothes, and undertakes to fix the conditions under, and the prices for, which labor shall be bought and sold in that industry, when the parties to the wage contract cannot agree, it arbitrarily destroys the freedom of contract of those who need it most to the arbitrary advantage of those who need it least. The manufacture of clothing is not a monopoly. In the nature of the business there is no reason why it should become a monopoly. If it threatens to, the government may interfere and destroy the monopoly. And this it may do, whether the monopoly is achieved by the manufacturers or by the workers. On the other hand it has never been supposed that the man who has a coat to sell must sell it at a price regulated by the state. If the manufacturer, the wholesaler, or the retailer are not to be compelled to sell an overcoat for $25 and the purchaser to pay $25 or go without, why should the laborer who works upon the coat be told that he must accept 75c an hour for his labor, work 8 hours a day, no more or no less, or look for a job in a trade he does not understand, offered by people he does not know? Yet, whilst the clothing dealers of Kansas may hold their clothing in storage to await buyers who will pay their price, the laborer in the clothing industry must, if the employer will not agree to his price, accept the pay which three gentlemen say he must accept or abandon the trade he knows. A state can successfully fix the price of a service which must

be obtained and can only be obtained from the end of a particular wire or a faucet on a particular pipe, because that service is uniformly rendered to all persons, the cost of the service to all persons is uniform, and it is protected against competition. But the state cannot successfully regulate the price of an article, which may come from anywhere, may be sold anywhere, and may reasonably cost to the producer one amount today and another amount tomorrow. Yet, surely, if those who profit by the sale of that commodity cannot be compelled to buy and sell at a fixed price, it is wholly unreasonable to believe that any system which undertakes to fix the price of the labor which goes into that article can long endure.

In the degree of public interest with which it is "affected," between the business of transportation and the manufacture of clothing, stands the production of fuel. Like clothing it is essential, but unlike clothing it is essential at the moment it is needed and a burden at any other moment. This means that the public demands a steady flow of coal from the mines to the markets. But sometimes the demand is greater than at other times, which means that sometimes more mines must be operated. The costs of operation in some mines is higher than the cost in other mines. If the price of coal drops, fewer mines can be operated than if the price is higher. This fluctuation might be avoided if the mines of cheap operation stored coal or if the consumers bought coal when they did not need it and stored it till they did. Shall the state arbitrarily fix the price of coal so that the purchaser must pay a good price for coal when he does not need it for immediate use or suffer the chance of not being able to get it when he does need it without paying an unlawful price, thereby subjecting the seller to a penitentiary term? But if the buyer and seller of coal are not to be the victims of such a tyranny, why should the miner be compelled to dig coal at a fixed price, under fixed conditions or abandon the trade in which his skill has permitted him to earn as much as he is able to earn?

The public must have coal. If the public is not to have coal because the miner and the operator cannot agree upon the wages, something must be done. But, is it true that the public does not get coal because the miner and the operator cannot agree upon the wage? No, the fact is that the miners are organized into a labor trust which has made it its object to see that no one shall mine coal who is not a member of the trust, that no one shall produce coal who does not produce it upon conditions dictated by the trust, and that whatever the demands of the trust it will not arbitrate them and every pound of its energy shall be put into the effort to enforce its demands in pursuance of that program. In an effort to make a contract that extended throughout the bituminous coal fields of four states, the United Mine Workers suspended operations in every mine in North America, both bituminous and anthracite, and flatly refused the counsel or the good offices of the government in making an adjustment of their demands. The law is competent to handle that situation whenever the public is ready to have it do so, and the public will be much better satisfied with the result which it obtains from enforcing the law against monopolies than it will be satisfied with the results of any program which attempts to fix the wages of miners.

The miner, the clothing worker, every other worker, wants the same opportunity to sell his labor at the highest possible price wherever and whenever it is obtainable. He wants the freedom to be the judge of the opportunity to secure the highest possible price. If he does not have this, he is denied the freedom which the merchant enjoys, who keeps or sells his commodity as seems best to him according to varying market conditions. The workman cannot justly be restrained unless the merchant is restrained. So if we are to seek the way out of industrial warfare by the creation of wage boards and industrial courts, which shall determine the terms upon which laborers must part with their labor or starve, we must face the full consequence of that position, we must prepare our minds to restrain the merchant as well as the workman, and abandon the search for the principles of industrial freedom which shall afford an opportunity to every element in industry to get what it can in accordance with its relative position in industry and the equal right of the other elements in industry to do likewise.

The other course open to us is to study the facts underlying industry, to define the rights of employers and employes which those facts involve, the lawfulness and unlawfulness of methods employed in forcing bargains over wages, hours, and working conditions, and then leave the parties to find the economic equilibrium upon which they can both engage in industry with the greatest degree of security and reward to either, with a like degree of security and reward to the other. This will involve a complete abandonment of any attempt to fix wages where the necessity of the service does not compel general supervision of all rates and interest on capital. This theory will involve a detailed study of the several causes of strikes and the methods of their conduct, with a view to determining when a strike is a proper exercise of self-help and when it is not, and what limitations should be thrown about its conduct.

But primary to all questions and fundamental to the security of our industrial system, there must be a thorough understanding of the dependence of the American workman upon the structure of industry, the advantage which the industry has from that dependence of the workman, and the obligations which it owes to the workman in return for that advantage. It follows, of course, that there must be a legal weighting of the opportunities which industry affords the workman, and the obligations which he owes to industry whenever he elects to take advantage of those opportunities.

It was pointed out at the beginning that the opportunity of the workman to work at his trade depends upon the offer of employment by those who control the machinery of production. In private industry their control is theoretically if not in fact complete. Each industrial unit stops, starts, slows or speeds the wheels of industry according to its managers' sense of business opportunity and the prospect of profits. Nine-tenths of one per cent of all the industrial employers of the United States employ forty per cent of all the employes. A trifle less than 10% of all the employers employ 70% of the employes. This particular 1% of the employers who employ forty per cent of all the employes are railroads and the great manufacturing con-

cerns. These employers make the greatest effort to maintain their labor forces intact. They offer the most secure employment. Yet, a comparatively slight expansion or contraction of these great businesses may have a serious effect upon the business of smaller employers who depend upon the products of the larger concerns.

The United States has a "normal" unemployment of approximately 1,500,000 workers. During the recent depression our unemployment rose to between five and six million. It is not extravagent to say that 2,500,000 workers or about 10% of the industrial population is likely to be hired or "fired" at any moment according to the business judgment of a few thousand men. However truly those men who exercise this judgment are controlled, or believe themselves controlled, by economic conditions over which they have no control, it does not alter the fact that the average workman sees his opportunity to earn all that he is able to earn resting in the business judgment and opportunity of somebody else.

It is this practical situation which must be relieved. It is this practical situation which is at the root of the cry for democracy in industry and which is the basis of the strength of trade unionism today. It is this situation upon which industrial unionism is daily waxing stronger. But the trade union of today merely seeks to take from the employers the control of the opportunity of employment and manipulate it in the interest of the greater power of the union and the army of self-seeking union office holders. Unions seek to substitute their control for the employers' control, whilst the moral right to the opportunity of employment goes as fully unheeded by the union as by everybody else. In fact, in so far as the right has received any practical attention, it has come wholly from the employers in the development of such experiments in employe control and insurance against unemployment as those being worked out by the Dennison Company and the Duchess Bleachery Company and by those few big corporations which dig into their surpluses to pay the wages of their skilled employes in times of depression. But the control of the opportunity of employment in the hands either of the employers or trade unions smacks too much of despotism, however benevolent or however undesignedly it has come about. It will be the business of the law to define the right to the opportunity of employment and to protect it.

Having defined that right and devised means for its protection, it will equally be the duty of the law to define the obligation of those who take advantage of the opportunities of employment and evolve methods for the enforcement of those obligations. If, let us say, the employer of more than ten employes must build over a period of years, and thereafter maintain, a fund, bearing a definite relation to the capital investment or the annual pay roll, with which to secure the payment of wages to those who otherwise would be discharged for lack of work, the workman who enjoys the protection of that fund must be under strict obligation to perform an honest day's work according to standard suitably arrived at by competent engineers. At the same time, if an employer who desires to discharge a workman, can find employment for him at his trade in another establishment in the same or a not too distant community, the workman must accept it or forego the benefits of the protection which the unemployment fund would afford.

So, too, under such a system of employment, although the workman may be free to strike in order to secure a higher wage, it seems certain that he may not strike to compel the employment of only members of a particular organization, for in every case the test of employment must be the ability of the worker and not the power of his fraternity.

The question is raised and will continue to be of urgent importance as to whether workers can be free in the economic sense who are engaged in an industry that is not economically independent. In other words, if any industry cannot afford to pay a living wage, or whatever may be accepted as a wage necessary to maintain the worker in health and decent conditions, can an industrial society suffer it to exist? It is evident that the workers in such an industry must rely for their full support upon the earnings of workers in other industries or upon the charity of the state, supplied by the taxation of other industries. Is it necessary that minimum wages be established by law in order to drive out of industry all of those businesses that cannot stand upon their own feet and then to admit the obligation of the state to qualify by education and vocational training every worker to earn at least that minimum wage? Failing to succeed in so qualifying the worker he would be classified as a defective and become the object of state charity. It is the business of the law to study this proposition and to determine what must be done in order to give industry and the industrial worker the greatest opportunity and to establish as a matter of fact what industries can afford to pay a decent wage and what industries cannot. At the present time we do not know, and some industries may still be paying less than a decent wage as a result of the ignorance and impotence of the worker.

If we can secure to the worker, as a matter of law, as much opportunity of employment as our industry is capable of affording by making the rapid extension and contraction of business enterprise unprofitable and compelling industry to afford some degree of protection against unemployment before paying dividends, and if we can squeeze out of operation those employments which do not really pay for the labor exerted in them, we shall have taken great steps forward in the stabilization of the industrial structure. It is to be hoped that we shall also have released the moral forces within the elements of industry which are now stifled by the constant warfare between employer and trade union over the control of the opportunities of employment. If we awaken a sense that the industry is beholden to its workers to afford a reasonable security in the continuity of employment, it should not be difficult to awaken in the employe the sense that in the last analysis the opportunity of employment and the value of employment depends upon the honesty and faithfulness of his work.

In the beginnings of political organization, man jumped from an entirely free and untrammeled agent to the subject of a despotism, whether by chief, patriarch, or king. It took many centuries to define the political rights of man whilst preserving those political obligations upon which a strong

state might be builded. Those rights are today fairly well understood and accepted. Yet their practical realization is still a matter of debate in every part of the world. In the struggle of the Anglo-Saxon race for practical political liberty from the announcement of principles in Magna Charta in 1215 to the passage of the 19th Amendment in 1919, we see it is no easy task to vouchsafe to a people actual liberty whilst protecting them against license. The political experience of man is duplicated in his religious experience. The early manifestations of religious life of the community are invariably despotic. Less than 300 years ago men were being burned by the thousands because they were not Catholics. Today a shrouded organization molests hundreds because they are Catholics.

Now within the last hundred years man has for the first time organized his industrial life. It is not surprising that its first manifestations, whether viewed from the standpoint of organized capital or the standpoint of organized labor, are arbitrary. It is the function of law to define industrial liberty as it has defined political and religious liberty, to guarantee that liberty and devise the proper means for the enforcement of those guarantees. It will be well if we can, in so doing, avoid an era of legal despotism designed to prevent the several parties to the industrial conflict from asserting the strength of their own positions. It will be well if we can avoid retarding industrial growth by making any enterprise hazardous or any occupation comparatively worthless by telling those who invest and those who work that if they are fortunate they may have 6 per cent a year or 75 cents an hour and not a sou more. It will be well if we can always bear in mind that the distrust, disruption and the violence, which is unhappily a part of our industrial life today, is not itself the evil, but is merely the manifestation of a situation for which no one is to blame, but which, nevertheless, all of us must help to correct.

And it will be exceeding well, if, in the attempt, we allow no selfish minority or headstrong enthusiast to disrupt the fine and sensitive structure of our present government, or suppress the long established rights of individuals guaranteed to us by our constitution. We have nothing to destroy. We have only the task of patient study, the disinterested statement of the new facts of industrial life, and the thoughtful pronouncement of the new obligations which they entail.

RAILROAD VALUATION: A STATEMENT OF THE PROBLEM

By LESLIE CRAVEN

Counsel, Western Group, Presidents' Conference Committee on Federal Valuation of Railroads

(*Continued from the November issue*)

As has been suggested, the issue presented by the appropriation of the so-called "unearned increment" in a building site and the recapture of the earnings of a railroad, from the standpoint of economics, is the same. The determination of the value of a railroad, however, is peculiarly more difficult than the determination of the value of land. Therein lies one of the strong arguments of the proponents of the cost theory. The formation of the same kind of judgment, by a court or jury, upon which the owner of the lot is dependent, is not facilitated by the same data, which ordinarily, although not always, are available where a lot is appraised. The very size of the railroad property and the complexities of the forces affecting it, make the problem more difficult. Thus far in American jurisprudence, however, it has not been held that the difficulty of the formation of a judgment by a court or jury can be a justification for a disregard of property rights protected by principles, in applying which a judgment is required. As the court said in People ex rel Kings County Lighting Co., 210 N. Y. 479, "Rate making is difficult. But that will not justify confiscation." The impossibility of reducing the process to articulate and precise forms, (as perhaps cannot occur where true value, as distinguished from a cost rate base, is ascertained), does not of itself justify an adoption of a cost formula, as an easier way, where the cost method obviously does not reflect the attributes of the property. The Smyth-Ames doctrine is very far from being an ideal doctrine. It is not ideal because indefinite. It is, however, no more indefinite nor unscientific than other means of the definition of rights dependent upon the formation of human judgment, and upon which basis fundamental rights of life and liberty depend. The system of the regulation of public utilities began with certain definite conceptions of the institution of private property. It was suggested at that time that the basis of regulation ought not to be the value of the property, but should be either the original investment or the reproduction cost. Then as now, it was seen that those suggestions were not compatible with the organic law, because cost figures were not the economic equivalent of the property. Today the issue is exactly the same. Much may be said with reference to the theoretical advantages inherent in regulation upon a basis of investment or cost, particularly if it could be established at the time the investment is made and the property rights are acquired. However desirable that might be, were we to begin to build the entire structure of these rights anew, yet from a practical standpoint, the rights of private ownership in these utilities were established and recognized for generations prior to the time that the early decisions initiated the regulation of these properties. These rights in private property have been recognized since that time, business has proceeded, the properties have been bought and sold, and investments have been made, on the faith of their recognition. If these rights are to be abolished, it should be done openly as the result of the consideration by the

nation expressed in legislative action, and not by the adoption of theories of "value", involving not real value, and by which the confiscation is accomplished in fact, although not perhaps in an open way which is obviously apparent on cursory consideration. In the case of the American railroads involving an investment of twenty billion dollars, the greatest industry of the nation excepting agriculture, the difficulty of the formation of a judgment by a tribunal in extending the constitutional safeguards to the rights in private property in that industry, is not a justification for the breaking down of those rights of private property, and a withholding of the constitutional protection.

The considerations which I have outlined indicate the effect upon property rights, if their economic equivalent or value is not made the basis of rate regulation. A further phase of this matter indicates that if the standard of value intended to be established in the Smyth-Ames case is abandoned, the protection of property rights in railroad property will be practically impossible. This is illustrated by the contentions of the proponents of the substitute cost theory, made before the Interstate Commerce Commission in the course of the federal valuation investigations. Mr. Prouty, Director of the Bureau of Valuation, early in the work enunciated the theory of those who believe that a value for rate purposes must rest upon cost. In the course of the Texas Midland case, (that being one of the early cases used for purposes of a clinic), he said that value, as value is concerned in rate controversies, is not value at all, but is a political rather than an economic concept,—a thing, to use his language, which cannot be "defined," but can merely be "described." It is "an amount of money" upon which it is "just" and "reasonable" that the utility be entitled to earn a return. The problem, as thus defined, is to ascertain "what is fair." This conception lacks any element of scientific or legal exactitude. "What is fair and reasonable" is all things to all men. That the doctrine is destructive of rights in private property is demonstrated by the contentions which have been advanced under it by certain of its proponents. These contentions are that recognized property rights shall not be protected because it is not "fair" to protect them. For example, it has been contended before the Interstate Commerce Commission, in the determination of a so-called "value" under this theory; first, that lands or other property owned by the carrier and devoted to public service, but which were donated to it, should be excluded from the valuation because it is not fair that the public should pay a return on such property because donated by the public; second, that the original cost of the lands should be the basis of determination, instead of the present value, because it is not fair that the carrier receive a return on the unearned increment; third that there should be no recognition of the element of value, known as appreciation, adaptation, or solidification of a road bed, because such condition, although admittedly an element of value, accrues in part as the result of work charged to operating expenses which is said to have been "paid for by the public," and upon which it is, therefore, said not to be fair to charge the public a return; fourth, that in cases where a company has owned a logging railroad and the investment in which has been largely amortized from earnings, the public should not be charged a return upon the full value thereof, when the railroad subsequently is devoted to a common carrier business, it being unfair to do so, because the carrier has amortized its original investment; and fifth, that where additions and betterments to the physical property have been charged to operation or surplus, as for example, where bank widening has been charged to ordinary maintenance, such property should be excluded from the valuation because charged to operation and therefore "paid for by the public." In each one of these instances the doctrine of "what is fair" is advocated as a means of depriving the carrier of a return upon what is unquestionably its interest in private property, thereby removing such property from the category of private property. Since "what is fair" or "reasonable" is a matter susceptible of no definition, and finds no accepted definition in any authoritative statements of legal or economic principles, the standard, as a standard of the measurement of the protection of property rights, is not a standard at all. It makes the protection of those rights entirely a matter of the individual conscience of the tribunal charged with the determination. The doctrine practically makes the commission free to adjudicate legal rights without direction of legal precedents. To use the language of the *Minnesota Rate Cases*, such property is then "at the mercy of legislative caprice" if the courts approve that theory of valuation.

The situation is made more difficult and the protection of property interests more nearly impossible, as the result of the form of finding now commonly employed by the commissions. It is customary for the commissions to couch their findings in most general terms. When findings are not definitely expressed or explained, they are more proof against attack or review. Consider as an example the form criticized by the Illinois Supreme Court in State Public Utility Commission v. Springfield Gas & Electric Company, 125 N. E. 891. It reads:

> After considering all the evidence and testimony in this case bearing upon the value of the property herein, the cost to reproduce, the original costs, the investment, the present value, all overheads, including such as preliminary costs, engineering, supervision, interest, isurance, organization and legal expenses during construction, contingencies, and all other elements of value (tangible and intangible), and taking into consideration that the plant is now in successful operation and a going concern, the Commission finds the fair value of the respondent's gas property in Springfield, for the purpose of determining reasonable and just rates, to be $744,000 exclusive of working capital.

A very similar form is employed by the Interstate Commerce Commission in its tentative valuations. It is not customary to accompany these findings by an analysis of methods as to the finding of value. The result is that if this form of finding is employed, and if the concept of value urged by those who are anxious to depart from the doctrine of the Smyth-Ames case is adopted, both the utility and the public are practically without means of redress. If there is an inclusion or exclusion of such items of property as were mentioned in the six items just referred to, and which certain of the proponents of the theory suggest should be eliminated from consideration, and the blanket form of finding is employed, a court review of those points is a practical impossibility. This is particularly true where the form of finding employed by the commission recites that all of the facts and elements

have "received consideration" or "have been considered," that language being used customarily to mean, not that such items have been given probative weight in the determination, but merely that such items have been considered from the standpoint of whether or not any probative significance should be attached to them. Thus it occurs that the commissions have issued valuations in which a final value is stated to have been derived after a "consideration" of matters which it is known were excluded from probative influence. There can be no proper defense of any such practice. This practice is inconsistent with the doctrine announced by the United States Supreme Court in the case of Ohio Valley Water Company v. Ben Avon Borough, 40 Supt. Ct. Rep. 527, where the Court held that there must be provided a fair opportunity for submitting the issue of confiscation of property to a judicial tribunal for determination upon its own independent judgment upon both the law and the facts. The review of the decisions of law and fact cannot be defeated by a failure to disclose those decisions.

How the problem whether the property or its cost is the thing protected will be ultimately solved by the United States Supreme Court, it is difficult to say. No cases involving the valuation of railroad property are now before it. Significant light is thrown upon the problem, however, by the decision of the court in the case of Southwestern Bell Telephone Company v. Public Service Commission, decided on May 31st of this year. In this case the majority opinion reiterates the familiar language based upon the doctrine announced in the case of Smyth v. Ames. There is a vigorous and masterful opinion, written by Mr. Justice Brandeis and concurred in by Mr. Justice Holmes, which is virtually a dissenting opinion. In this dissent it is suggested that the doctrine of Smyth v. Ames is obsolete and should be abandoned, and that the basis of determination should be the prudent investment in the property. It thus appears that the abandonment of the Smyth-Ames doctrine has been considered by the Court. At the present time the doctrine stands.

The problem of the making of rates as a legislative matter is distinct from the problem of testing rates as a constitutional and judicial matter. The two fields of inquiry, and their respective standpoints, are entirely distinct. The court in reviewing legislative action must, and does, in its deliberations, exclude questions of public policy. On the other hand it is the very function of the legislature to determine matters of policy. The distinction between a rate base (as a means of rate making by a legislative agency) and value (as a means of rate testing in a confiscation case by a court), has been frequently, and is ordinarily overlooked. This confusion has produced seriously unfortunate results in the regulation of public utilities, because it has meant regulation on a near-confiscation basis. The legislative branch of the government, or its agency, a regulatory commission, can establish reasonable rates on any basis whatsoever, and even without any consideration of value at all except that such legislative action is subject always to the constitutional restriction preventing the establishment of rates so low as to effect confiscation. The standard fixed by the constitutionally protected value is an irreducible minimum. It marks merely the lowest limit. The commissions, however, have felt bound to apply, in the exercise of legislative functions, this bed-rock criterion of the judicial conception of value derived from opinions in confiscation cases. The distinction thus forgotten has been recognized repeatedly by the courts although it has not been ordinarily observed by the commissions. There is an excellent discussion of this point in the case of Waukesha Gas & Electric Co. v. Railroad Commission of Wisconsin, decided July 25, 1923, by the Supreme Court of Wisconsin. The distinction is also recognized in the case of Galveston Electric Co. v. Galveston, 42 Sup. Ct. Rep. 351, and in Southwestern Bell Telephone Company v. Public Service Commission, decided by the United States Supreme Court on May 31, 1923. In the Galveston case, it is said that important elements of cost, such as development cost, may properly as a matter of policy be considered in making rates, but cannot be considered in a confiscation case, since they do not reflect value. The same doctrine would seem to apply, in determining a rate-base for making rates, in the treatment of many other elements such as bond discount and depreciation.

The results effected by this unfortunate confusion are illustrated by the federal valuation work where the commission's determination of value has rested on the basis of precedents in confiscation cases.[2] The value determined purports to be the value there defined. The cases cited in briefs of counsel are entirely of that character. The Transportation Act, however, requires the making of rates which, at the time of the enactment of the statute, were to return 5½ per cent on the value, this being in 1920 and at a time when liberty bonds were selling on a basis in the open market which would net the purchaser about 5 per cent. Since that time carriers whose credit was of the best, have refinanced bond issues with money costing above 6½ per cent. Rates intended to produce such low rates of return are fixed under a provision of the Transportation Act which in terms requires making of such rates "in the exercise of its (the Commission's) power to prescribe just and reasonable rates." This enactment as administered by the Commission thus produces a situation in which the entire distinction between *reasonable* rates as determined by a legislative agency in the exercise of its rate-making power, and *compensatory* rates as determined by a court in a confiscation case as a matter of judicial determination, is overlooked. This is because the rate of return as fixed by the Act is probably below the level which a court would regard as proper in a confiscation case, whereas the value is determined on the basis of bed-rock precedents established where the issue is the judicial issue of confiscation. The Interstate Commerce Commission has perhaps felt itself constrained by the provisions of the Transportation Act which do not recognize these essential distinctions, and which contemplate that rates shall be made upon the same basis upon which the test of recapture depends. The Commission's action depends upon legislation which does not observe certain necessary distinctions.

In an earlier part of this discussion, it was suggested that the property of the railroads might

2. The cases cited as authority in the Commission's decisions rendered subsequent to the time this address was delivered are entirely confiscation cases. See, for example, the San Pedro decision, pages 607-11, inclusive.

be protected, as required by law, either by making rates on the basis of the true value of the property, as fixed as the case of Smyth v. Ames contemplates, or by making rates for the group on a cost basis for the railroads comprising the group, in which case there should be no recapture of the earnings of an individual road in excess of a fair return on the cost of its property. Under the present conditions, as a practical matter, the Commission ought to follow the second of these two methods. Although this work was begun in 1913, the Commission has not determined, and its investigation of the railroads probably does not afford the data enabling it to determine, the true economic value of the property of each individual carrier. Had it properly determined such a value, that value would have afforded the proper basis for the making of rates. Rates need not, however, be made, necessarily, on a value basis. From the standpoint of a proper theory of rate making (as a legislative matter) as distinguished from rate testing (as a judicial matter), it appears that rates for a regional group may properly be made on a cost basis. The railroads of any regional group are like the various lines of a city traction system. The whole traction system is a monoply. The rates are made for the city as a whole. The whole system is necessary for the service of the city. Parts of the system, however, are necessarily more productive, and more valuable in the economic sense of the term, than others. Considering the system as a whole, as a matter of economics, its value under ordinary conditions, is properly reflected by its reproduction cost. State commissions throughout the country have so recognized, and have determined the value of such properties on the basis of a primary consideration of the present costs of their reproduction. The railroads of a region considered as a group, like the city traction system, are a monoply. Their value, like the value of a city traction system, may properly be measured on a cost basis. Competition does not operate to destroy cost as a reflection of true value, since the group when considered as a whole is a monoply. The Transportation Act contemplates the making of rates for groups of carriers. Under these circumstances, and following the precedents of the state commissions in treating the exactly analogous problems, a cost method should be used. Such a basis is economically sound, not only because cost properly measures the economic value of the group, when considered as a group monoply, but for the further reason that rates made on the cost basis reflect the true present cost of producing the service. This base should be determined as a legislative matter and on such a basis as to reflect the considerations of policy properly germane to a determination of legislative character. The problems of policy involved in the fixation of such a cost figure cannot be adequately discussed within the limits of the time fixed for this address, as for example, whether present, or pre-war prices, shall be employed, a question as to which even the United States Supreme Court is apparently somewhat in doubt.

But although the value of the group may properly be determined on a cost basis, and although rates for the group may properly be made in that manner as a matter of legislative determination, and in the establishment of reasonable rates as a legislative matter in contradistinction to the testing of compensatory rates or the issue of confiscation as a judicial matter, yet when the rights of the owners of the property in the individual lines comprising the group are in issue and the constitutional safeguards are invoked in protection of those rights, the recognition and protection of the rights in private property in the respective lines necessitates the consideration of the differentials in location and value naturally existing between them, which are not reflected in cost. A judicial issue then arises. The value of the property, and not its cost, becomes the criterion.

My purpose in the time which I have had at my disposal, has been to show you what I believe to be the crux of the valuation problem, as that problem is presented in the railroad valuation work. The problem is obviously, a hard problem. The laws of property, and of its constitutional safeguards, are not fixed. They do, and should, change to reflect the evolving, and we hope higher, conceptions of the mutual rights and duties of men. Those conceptions, as reflected by the courts, are the controlling thing in the working out of such great issues as those involving the distribution of wealth. Legal principles, and doctrines of constitutional law are merely the pawns with which the game is played, according to certain principles rising in human consciousness as the result of education and unfoldment. Mr. Woodrow Wilson in a recent magazine article, has called attention to the need of turning away from the mere surface appearance of things, with a realization that the settlement of the great problems arising from the war lies deeper, and must be found in an increased recognition of the essential brotherhood of men. It seems that we will not have peace in Europe until there is a mutual recognition of mutual rights. So in the last analysis, a right solution of these great problems involved in the distribution of wealth and the rights in property, will never be found in quotations from Smyth v. Ames, but rather in an awakening consciousness of the men who are responsible for the development of the law, to the essential unity of the interests of this great American family of ours, and a mutual recognition of mutual rights. The problem of utility regulation arose largely because of the failure of the owners of utility property to recognize fully their duties to the people. The problem has continued in part because of the failure of the public to recognize the duty of the public to respect rights in property. Whatever you do, you will not solve the problem until there is a recognition of mutual rights. You may preserve the rights of private property, or you may destroy them, but you will not have harmony or efficiency. Theories of valuation, and the interpretation of the decisions of the cases, have their part. But the answer to the problem must be found in a breaking down of prejudices, and in making the American people recognize that the industrial progress of our national life lies essentially along lines of unity, and not through the separation caused by disregard of mutual rights and mutual responsibilities.

"There is no such pleasure in the world as forcing an alien virtue on our reluctant neighbor. It has all the expansive smugness of beneficence, and all the tart sweet flavor of malignancy."—Ex.

LAW ENFORCEMENT IN A GREAT CITY

In Notable Utterance at Recent Banquet of Chicago Bar Association Mayor William E. Dever of That City, Former Judge of Superior Court, Points Out the Limit of Official Discretion in Law Enforcement

IT IS a significant commentary upon our moral standards, or our ideals, when it can be said, and truthfully said, that there is a wide difference of opinion in important places in this city, as to whether the Mayor of the City of Chicago should endeavor to enforce the Constitution of the United States.

Now, that is just exactly what the situation is here in Chicago today. We have great publicity agencies saying that the Mayor of Chicago has made a great mistake, because he is trying to enforce the law. The newspapers of this city, not one but several of them, are intimating, some of them in very plain language, that the law should not be enforced.

I am going to say a word on that subject tonight because I am talking to lawyers and to judges. I know, at least in this house, in this room, that no voice will be raised against a man who is trying to enforce the plain, undeniable, letter and spirit of the law. (Prolonged applause.)

Now, here are the facts. I have never taken part in any propaganda for or against prohibition, and I am not going to do so now. I am not going to enter into a campaign of any sort to mould public opinion on that question, either one way or the other. . . .

This beer running, this illegal traffic in liquor, had gone so far as to threaten the very foundation of government in this city. Men high in the service of the city, men known as important public officials, were said to have forgotten all about their official relations to the community, and were spending their time and investing their money in a business that was a direct violation of the law; and those enterprises had percolated and ramified into every possible strata of our social life. It went into the homes of the poorest families in Chicago, and its presence was found in the homes of some of the wealthiest families in Chicago. It entered into every phase of our lives, social, economic and political; and when it became apparent that this traffic had caused murder upon the public streets, I became convinced that something drastic had to be done.

First we began our campaign by putting out of business certain well known places of vice in this city, places that were notorious. That did not seem to do much good. We put the gamblers out of business. That did not have any effect at all.

There was another enterprise, a great syndicated thing that had taken on the proportions of a great business organization, a business that enabled them to manufacture beer, for instance—I am only mentioning one of the commodities—for four or five dollars a barrel, and to peddle it out as a great flowing traffic all over the city of Chicago—to peddle it out to retailers at $55 and $60 and $65 a barrel. The great margin between the cost of production and the retail price was variously distributed where it was doing the community an immense amount of harm and threatening its very existence. That is what I found after we had made our survey. I conferred not once but a dozen times, with the Chief of Police about these conditions. We came to the conclusion that there was only one way to handle it, that there was only one way to deal with it, difficult as it was, and annoying as it was to many persons. We determined we would have to put them all out of business, from the highest down to the lowest; and in doing that we had to take some very drastic steps.

Here and there, where there is a great organization like the Police Department, functioning in a way it never functioned before, of course it is quite possible that an individual policeman may now and then over-step the law. But after all, what I would like to have the Judges and the people believe, is this, that the great volume of work we are doing has for its purpose the suppression of the most villainous, vicious and wicked traffic that this or any other city ever knew. That is what we are attempting to drive out and to destroy.

As a matter of fact, I have been told that one of the methods of double-crossing us, if I may use that term, is by a few policemen showing a little over-zealousness in enforcing the law.

For instance, when our raids first began, when we first began to put these places out of business, one night eleven hundred people were taken into the police stations of the city of Chicago. I saw at once what that meant. I have been in politics for a long time, and I knew just what that meant. It was deliberately designed to render the administration tremendously unpopular and was done in the hope that it might be the thing that would in the end wreck our efforts to bring about an observance of the law in this community.

So I called in the police and I told them that we were after the law violators; we were after the men who sold or trafficed in liquor illegally, and we did not want them to arrest every person whom they might see going into or coming out of one of these soft drink parlors. The result was that the next Saturday night we got a great many more law violators, and the police stations were not nearly so crowded as they were on the former occasion. . .

Everybody knows that I am speaking rather moderately tonight, that I am not exposing the story as I believe it to be, but to my critics I want to say this: what would you do under the circumstances?

Some of these newspapers say I have made the greatest mistake of my life, and that my political career is ended. I think it is pretty nearly ended anyway, whether I make a mistake or not. (Laughter). There are certain natural laws at work in

NOTE: This is the concluding part of the address delivered by Mayor William E. Dever of Chicago, at the recent Chicago Bar Association banquet. The first part dealt with administrative matters of local interest.

my case, that I suppose will attend to that. But suppose I were a younger man, were ambitious and trying to lay the basis for a political career of some sort, I want to say to them that I think that no mistake would be made by doing just what I have done because if it can be said that any great political party is going to lose the support or the respect of the public, because one of its officials, one of the men it has placed in office does his sworn duty in enforcing the plain mandate of the law, and is not endeavoring to evade and nullify it, then I say that it comes pretty near being the end of our boasted institutions, of our boasted sense of justice, of liberty and of freedom and of all that is good and fair in this great country. .

Let me recur to what I was saying a moment ago to my critics. If what I am saying is true—and everybody knows that it is true—what was I to do? I could either go on and enforce the law, just as I am trying to do, or let the law violators go on with their traffic. And if I did the latter, what would have happened? Suppose I should desist tomorrow from my efforts to enforce the law, what is going to happen to law and order and respect for law and order in this community?

What do you think of a great newspaper that will have the effrontery, in this day and in this generation, to argue whole columns against such a plain and necessary thing as the duty of a public official to enforce the law?

Or do they suggest that I am going too far? Do they think that there is some compromise that could be made? If that is their attitude, then I would like to know what sort of a compromise can one make with the things that have been going on in Chicago. They asked me to submit the matter to a referendum of the people, and to use such influence as I have in the City Council for the purpose of submitting at the last judicial election the question of whether the people of the city of Chicago will support us in our efforts to enforce the law; and I told them I would have nothing to do with such a proposition.

I said I would not insult the intelligence and the manhood of the City Council by asking them to vote for such a proposition. I said that if the Council, of its own motion, should pass such a resolution and it should put such a question on the ballot—if every citizen in the City of Chicago voted in the affirmative or voted against my program, I would still enforce the law.

I am trying to be as subservient to the public will as I can be; and out of a long political career I have learned to keep my ears as close to the ground as the average politician. I try to find the public pulse; I am anxious to please the people. But there is one thing the people have no right to do, no power to do, and that is to make a law-breaker out of me or out of any other man. (Applause.)

I have talked a little earnestly on this question, because I am talking to lawyers and to Judges. I have not aired my views very volubly about it in other places. I have spoken a little earnestly about it here tonight, because I feel rather earnestly on the whole subject.

I do not want the people of this city to think I am taking a too high moral attitude; and that I am in advance of my times, or that my moral standards and ideals are different from those of the average man, or that I want every person in a great cosmopolitan city, made up of all sorts of people, including peoples of all the religions and races in Christendom to lead the sort of life that I want to lead. That has not been and is not my attitude. I have felt that we are dealing with a fundamental question, and I do not think that a public official who refuses to enforce the law can look his fellow man in the face thereafter. . .

I do not want you lawyers to think for a moment, either, that I am trying to side-step responsibility. I want you to know that there is a sincere show-down going on in Chicago today. It has been going on and it will continue to go on, between the organizations of law-breakers, and of law enforcers, and I know which organization is going to win in the end.

I am not trying to shelve responsibility upon anybody else. I am not trying to say that this job belongs to the Federal Government. I am not trying to urge that it belongs to the State government or the County government. As a matter of fact, it is only just to say of the State's Attorney, and particularly of Edwin Olsen, my friend and member of the Bar, the present District Attorney of the United States for this District, that they are giving us splendid aid and service in the work that we are trying to do. It is a great pleasure to be able to say that. I could not pass the buck to District Attorney Olsen, because it would be unfair to him. He is doing all that he can to help us. But if he did not, what difference would it make?

I have said before, and I repeat, a great literature is being built up preparatory to the next Presidential campaign, in the effort to determine whose duty it is to enforce the law; and it seems to me childish, to say the least, because every lawyer knows it is the duty of every public official, every law enforcing agency in the United States, from the President of the United States down to the most inconspicuous constable of the most remote village in the country, to enforce all the laws within his jurisdiction.

And my attitude has been, and is, that I am receiving and expect to receive aid from the other law-enforcing agencies. But if I do not receeive it, even if they should refuse to perform their full duty in the matter, it would be folly for me to say as the nominal head of a police department of nearly seven thousand men, I cannot stop law breaking of the kind that we have been dealing with in this city; law-breaking that has been occupying every corner in Chicago; law-breaking that has taken possession of and used the public streets, law-breaking that has entered into our official organizations; what folly it is to say of the Mayor of this city, or the mayor of any other city who wants to do his duty, that he cannot stop that sort of law-breaking.

I want to emphasize just this one word in closing. Notwithstanding what reports you may have received, I have never said, and I am not going to say, that it is the duty of anybody else to do this work. Whatever may be the responsibilities imposed by law upon others, it is undeniable that it is my duty to endeavor to enforce the law in Chicago, and I want the lawyers to know that I am going to do it. (Prolonged applause, the audience rising.)

DECISIVE BATTLES OF CONSTITUTIONAL LAW

X. THE LEGAL TENDER CASES

(Hepburn v. Griswold, 8 Wall. 603; Overruled, Knox v. Lee, 12 Wall. 457; Juillard v. Greenman, 110 U. S. 421.)

By F. DUMONT SMITH
Of the Hutchinson, Kansas, Bar

THE decision in the Legal Tender cases is now of little practical interest to working lawyers. With the credit of our government superior to that of any the world ever saw, with every paper dollar at par with gold; the right of the government to make its paper money, Legal Tender is of no present importance, but the cases are of profound historical interest. Not more than two or three other cases have excited such bitter animosity, such praise and condemnation or so completely arrayed the entire country into two hostile camps, one upholding, the other condemning, the decisions which first held the Legal Tender Act invalid, then valid.

In February, 1862, the government was at its wit's end for funds and the country was almost without a circulating medium as gold had retired into hiding. State bank bills were greatly discredited and more or less at a discount, no matter how good the bank of issue, when presented in another state. Congress, therefor, began the issuance of paper money. The question arose whether this paper which contained merely an indefinite promise to pay in specie, not at any particular time, could be made to circulate on the faith of the government or whether the Legal Tender quality could lawfully be imparted to it and would that quality help its circulation and the maintenance of its value.

Secretary Chase, afterwards Chief Justice, then believed that the government had the inherent power to make these bills Legal Tender and that it would help the circulation of the bills and the maintenance of their value. This view was acquiesced in by the president and the rest of the cabinet and by a majority in Congress. Accordingly, these bills were made a Legal Tender for all debts, public or private, except customs duties and interest on the public debt. It was thought that by collecting the customs in gold, sufficient gold could be secured to pay the interest on the public debt, and there was, and that would help the floatation of the government's enormous bond issues. This paper money with the guarantee of the government back of it, used in the payment of taxes, local and federal, and of all debts, became very popular. Enormous quantities of it were issued. The total stood at one time at eight hundred million dollars. Of course, creditors whose contracts had been made before the passage of the Act demanded gold. It seemed inequitable that the man who had borrowed gold should be permitted to pay his obligation in paper depreciated at times to less than forty per cent of par. New contracts made referrably to this paper money stood on a different footing. Many suits were brought seeking to enforce the payment of debts in gold. The courts of Last Resort of fifteen states upheld the validity of the Legal Tender Act and compelled creditors to accept payment in paper. The sixteenth, Kentucky, in the case of Hepburn vs. Griswold, where the debt was contracted prior to February 25, 1862, refused to compel the creditor to accept payment in greenbacks and held that the debt must be paid in gold. The case was appealed to the Supreme Court of the United States and argued in December, 1869, decided February 7, 1870. At that time there were but eight members of the court and at the outset they were equally divided, four for the validity of the Act and four against it. Judge Grier, who was about to retire under the new Retiring Act, changed his mind and agreed with the Chief Justice; Field, Nelson and Clifford holding the Act invalid, while Judges Miller, Swain, and Davis dissented. The opinion was not delivered until February 7th after Grier had retired, but the Chief Justice stated that he was authorized by Judge Grier to say that the retiring Judge had concurred in the decision holding the Act invalid.

Properly speaking only one question was before the court, that is, was the Act effectual as to contracts executed before its passage, but the opinion of the court went far beyond this and held that the government could not make its paper money Legal Tender in payment of any debt whether contracted before or after the exactment of the law. The country immediately divided into two factions, the creditor class, small but very powerful, commending and upholding the decision and the debtor class furiously denouncing it. Immediately creditors began to demand payment of debts in gold, no matter whether contracted when gold was the only currency or after the Act when the paper money had greatly depreciated. Gold was then at a premium of one hundred and twenty and the decision added twenty per cent to every debt in the country at a time when the rapid deflation of the currency was already reducing the price of everything, crippling the debtor class and paving the way for the terrible panic of 1873.

On February 7th, the very day on which the decision was made, the appointments to the two vacancies by President Grant, of Strong of Pennsylvania and Bradley of New Jersey were sent to the Senate, thus restoring the bench to its full membership of nine.

On March 25th, four days after the confirmation of the new judges, Attorney General Hoar moved that the two Legal Tender cases, Latham vs. United States and Deming vs. United States, then pending, and which involved contracts made after the passage of the Act, be taken up for argument. This disclosed a purpose to seek a rehearing of so much of Hepburn vs. Griswold as referred to these subsequent contracts. A very unusual scene followed. It had been stated that Evarts, who was Attorney-General when Hepburn vs. Griswold was argued, had agreed that the Latham and Deming cases should abide the result of the other case. Attorney General Hoar denied that there had been any such agreement or order. Chief Justice Chase interrupted him to say that there had been such an order.

Judge Miller replied that he knew of no such order; both judges speaking with apparent feeling on the matter. Judge Nelson supported the Chief Justice and Davis concurred with Miller. The Chief Justice reiterated his statement with great emphasis and apparent passion. Judge Davis said it was idle to bandy words and the cases went over.

On April 25, 1870, these two cases were dismissed but on April 30, 1870, the case of Knox vs. Lee (12 Wall. 457), which had been argued in November, 1869, was set down for reargument. In this case Lee had sued Knox for the value of sheep which had been confiscated by the Confederate Government under its Alien Enemy Act, and sold to Knox. The question was raised that the jury should take into consideration in fixing the recovery, the fact that the recovery would be had in depreciated money. The court instructed the jury that the Legal Tender Act was valid, so the case was again brought before the court upon this very point with the intention of reconsidering the authority of Hepburn vs. Griswold.

Returning to the opinion in Hepburn vs. Griswold the Chief Justice first takes up the question of the inequity of compelling a creditor who had loaned gold worth par to receive in payment paper money depreciated at times to forty per cent of its face:

> Now it certainly needs no argument to prove that an Act, compelling acceptance in satisfaction of any other than stipulated payment, alters arbitrarily the terms of the contract and impairs its obligation, and that the extent of impairment is in the proportion of the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it need argument to prove that the practical operation of such an Act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an Act of Congress is to be favored, or indeed to be admitted, if any other can be reconciled with the manifest intent of the Legislature.
>
> We confess ourselves unable to perceive any solid distinction between such an Act and an Act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole value actually due, according to their terms. It is difficult to conceive what Act would take private property without process of law if such an Act would not.
>
> We are obliged to conclude that an Act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adated, really calculated to carry into effect any express power vested in Congress; that such an Act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constituion.

The case of McCulloch vs. Maryland, 4th Wheaton, 423, had stood for more than eighty years as a complete and final definition of implied power. It was cited by the majority and minority; the majority as authority that the power here contended for can not be implied because it was not necessary; the minority citing it to prove that among different measures which might be taken to effectuate an express power the choice lies with Congress. It is not for the Judiciary to say whether some other measure might have been more adapted to the end; it is sufficient that it is in some manner adapted and appropriate to the end sought.

This decision has been considered at length in one of these articles, but I will quote again Marshall's celebrated definition of implied power:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

The Chief Justice then argues that the Legal Tender quality of the notes added nothing to their value, the demand for them and quality of circulation, and did not in any degree tend to maintain their value at or near par. I leave the answer to that to Judge Miller. The Chief Justice undoubtedly anticipated that he would be criticized because he held invalid an act which he had sanctioned while Secretary of the Treasury. He said,

> It is not surprising that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who had doubted yielded their doubts; many who did not doubt were silent. Some who were strongly adverse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced.

It seems to me that the first part of the majority decision is clearly sound. To compel a creditor to accept payment in depreciated money, in effect, perhaps one-half of what he had loaned is clearly inequitable and it would seem that the fifth amendment, "due process of law," covers the Act in that respect. It is true that there is no prohibition against the Federal Government adopting an enactment that violates the obligation of a contract. That explicit prohibition applies only to the states, but good morals and honesty should restrain a government like ours from thus fleecing a large class of its citizens, the creditor class. However, outside of its written promises which it keeps with exactness, our government is not notorious for keeping faith with its creditors at large. It held the money derived from the French Sholiation Claims for fifty years before it disbursed any of it and many creditors having just claims against this fund died in poverty because the government was unjust. Over and over again Congress has refused to appropriate money justly due and on the other hand has paid extravagantly, creditors who had a pull with the law making body. In truth payment by the United States is like kissing, it goes by favors. Upon the other hand it would have been equally inequitable to compel the debtor who borrowed depreciated money to pay money worth par. The Chief Justice appears not to have considered that side of it.

I pass now to the minority opinion written by Judge Miller, which in Knox vs. Lee became the majority opinion and settled the law. As the minority held that the Act was valid regardless of whether the contract was entered into before or after its passage, its opinion touches very lightly on the question of good faith. There is a dispute merely as to whether under the definition given by Marshall in McCulloch vs. Maryland, the Legal Tender provision was necessary, appropriate or fairly conduced to carry out the power to raise money. Judge Miller begins with a lively picture of the condition of the government on February 25, 1862, when the Act became a law:

> All the ordinary powers of rendering efficient the several powers of Congress above mentioned had been employed to their utmost capacity, and with the spirit of the rebellion unbroken, with large armies in the field unpaid, with a current expenditure of over a million of dollars per day, the credit of our government nearly exhausted, and the resources of taxation inadequate to pay even the interest on the public debt, Congress was called on to devise some new means of borrowing money on the

credit of the nation; for the result of the war was conceded by all thoughtful men to depend on the capacity of the government to raise money in amounts previously unknown. The banks had already loaned their means to the treasury. They had been compelled to suspend the payment of specie on their own notes. The coin in the country, if it could all have been placed within the control of the Secretary of the Treasury, would not have made a circulation sufficient to answer army purposes and army payments, to say nothing of the ordinary business of the country. A general collapse of credit, or payment and of business seemed inevitable, in which faith in the ability of the government would have been destroyed, the rebellion would have triumphed, the States would have been left divided, and the people impoverished. The National Government would have perished, and, with it, the Constitution which we are now called upon to construe with such nice and critical accuracy.

That the Legal Tender Act prevented these disastrous results, and that the tender clause was necessary to prevent them, I entertain no doubt.

It furnished instantly a means of paying the soldiers in the field, and filled the coffers of the commissary and quartermaster. It furnished a medium for the payment of private debts, as well as public, at a time when gold was being rapidly withdrawn from circulation and the state bank currency was becoming worthless. It furnished the means to the capitalist of buying bonds of the government. It stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind.

The results which followed the adoption of this measure are beyond dispute. No other adequate cause has ever been assigned for the revival of government credit, the renewed activity of trade, and the facility with which the government borrowed, in two or three years, at reasonable rates of interest, mainly from its own citizens, double the amount of money there was in the country, including coin, bank notes and the notes issued under the Legal Tender Acts.

Discussing the effect of the legal quality so impressed upon these notes, he continued:

But when by law they were made to discharge the function of paying debts, they had a perpetual credit or value, equal to the amount of all the debts, public and private, in the country. If they were never redeemed, as they never have been, they still paid debts at their par value, and for this purpose were then, and always have been, eagerly sought by the people. To say, then, that this quality of legal tender was not necessary to their usefulness, seems to be unsupported by any sound view of the situation.

Certainly it seems to the best judgment that I can bring to bear upon the subject that this law was a necessity in the most stringent sense in which that word can be used. But if we adopt the construction of Chief Justice Marshall and the full court over which he presided, a construction which has never to this day been overruled or questioned in this court, how can we avoid this conclusion? Can it be said that this provision did not conduce towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection? Or that it was not calculated to effect these objects? Or that it was not useful and essential to that end? Can it be said that this was not among the choice of means, not the only means, which were left to Congress to carry on this war for national existence?

Let us compare the present with other cases decided in this Court.

If we can say judicially that to declare, as in the case of The United States v. Fisher, that the debt which a bankrupt owes the government shall have priority of payment over all other debts, is a necessary and proper law to enable the government to pay its own debts, how can we say that the legal tender clause was not necessary and proper to enable the government to borrow money to carry on the war?

The creation of the United States Bank, and especially the power granted to it to issue notes for circulation as money, was strenuously resisted as without constitutional authority; but this court held that a bank of issue was necessary, in the sense of that word as used in the Constitution, to enable the government to collect, to transfer and to pay out its revenues.

It was never claimed that the government could find no other means to do this. It could not then be denied, nor has it ever been, that other means more clearly within the competency of Congress existed, nor that a bank of deposit might possibly have answered without a circulation. But because that was the most fitting, usual and efficient mode of doing what Congress was authorized to do, it was held to be necessary by this court. The necessity in that case is much less apparent to me than in the adoption of the legal tender clause.

He sums up the whole matter in a manner worthy of John Marshall:

Upon the exactment of these legal tender laws they were received with almost universal acquiescence as valid. Payments were made in the legal tender notes for debts in existence when the law was passed, to the amount of thousands of millions of dollars, though gold was the only lawful tender when the debts were contracted. A great if not larger amount is now due under contracts made since their passage, under the belief that these legal tenders would be valid payment.

The two houses of Congress, the President who signed the bill, and fifteen state courts, being all but one that has passed upon the question have expressed their belief in the constitutionality of these laws.

With all this great weight of authority, this strong concurrence of opinion among those who passed upon the question, before we have been called to decide it, whose duty it was as much as it is ours to pass upon it in the light of the Constitution, are we to reverse their action, to disturb contracts, to declare the law void, because the necessity for its enactment does no appear so strong to us as it did to Congress, or so clear as it was to other courts?

Such is not my idea of the relative functions of the legislative and judicial departments of the government. When there is a choice of means the selection is with Congress; not the court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the Legislature and not for the court to determine. In the case in Wheaton, from which I have already quoted so fully, the court says that "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the Judicial Department, and to tread on legislative ground. This court disclaims all pretenses to such a power." This sound exposition of the duties of the court in this class of cases, relieves me from any embarrassment or hesitation in the case before me. If I had entertained doubts of the constitutionality of the law, I must have held the law valid until those doubts became convictions. But as I have a very decided opinion that Congress acted within the scope of its authority, I must hold the law to be constitutional, and dissent from the opinion of the court

It is not worth while to examine the opinion in Knox vs. Lee written very ably by Judge Strong. It adds nothing to the minority opinion in Hepburn vs. Griswold. It holds without reservation the Legal Tender Act valid and applied to all contracts executed before or after the date of the Act. The two new judges, Strong and Bradley, concurred with the minority three who had dissented before. A howl went up that President Grant had packed the court to reverse Hepburn vs. Griswold. That statement has been so often disproven that it is not necessary to discuss it here.

My personal opinion is that the majority opinion in Knox vs. Lee, upholding the sovereign power of the United States to make its paper money Legal Tender, a power inherent in every other sovereignty in the world, is absolutely sound, but I think it should have been restricted to contracts made after the Act was passed. That portion of the decision which compelled creditors who loaned gold to take their payment in depreciated paper is a stain upon the good faith of the government and a blot on the records of the Supreme Court. But the Legal Tender cases were not yet completed.

In Juillard vs. Greenman, 110 U. S. 421, decided March 3, 1884, the matter again came before the Supreme Court as to United States notes issued in 1878 in time of peace which were made Legal Tender. The

former decision had considered the matter largely from the standpoint of war necessity, but in the last named case eight of the nine judges then on the bench held that the government had power to make its notes Legal Tender whether issued in war or in peace. Judge Field, the dogged old fighter, went down with his flag nailed to the mast and wrote a very bitter opinion in which as usual he predicted destruction of the country if his opinion did not prevail.

This case settled for all times and beyond dispute the right of the government to impart to its currency the Legal Tender quality.

POLITICAL AND ECONOMIC REVIEW

Judicial Power and Judicial Social Theories

IN a communication in *The New Republic* for June 6, Morris R. Cohen says that the proposal for the recall of judges and of judicial decisions "has not been refuted but has rather been lynched by the hysterical outcry which the leaders of the American bar have raised against this proposed appeal from the legal forum to the people themselves. I have read everything which has been printed as an argument against the recall of judicial decisions and I cannot find a suggestion of anything worse than the present arrangement whereby five elderly gentlemen having limited sources of information and responsible to no one but themselves have the last word on all issues which may decide the fate of the nation in the years to come." A reply by the editors reviews the unfortunate experience with legislative administration of justice in (a) general appellate jurisdiction, (b) legislative divorces, (c) insolvency and (d) criminal prosecutions. The reply contains the following pregnant paragraph: —"A great deal of our present difficulty comes from our own invitation. The due process clauses like the Sherman law are almost commands to the average judge to read his fundamental economic and philosphical concepts into the law . . . Surely it is possible for the American people in the light of experience to give more explicit sailing orders to the Supreme Court . . . Such a method of modernizing the law seems to us infinitely more hopeful than the reversion to a discredited practice crude at best and corrupt and capricious at worst." Max Radin, on the other hand, in "The Ancient Grudge" in *The Freeman* for June 27, seems to rest his hope on the selection of more enlightened judges. It is unexceptional, he holds, indeed inevitable, for judges "to judge cases according to the measure in which they do or do not further" a social theory of the value of which they are convinced. "A flexibility of system that enables Judges Taft and Wilkerson to apply their social theory, may permit their liberal successors to apply a different one."

A considerable measure of criticism of the Supreme Court has been renewed by Justice Sutherland's social theories, expressed in the minimum wage decision. *The Survey* for May 15 contains a symposium of views on the decision. Josephine Goldmark, speaking of the Justice's method of approaching the subject, says that "for him a 'just equivalence' between work done and wages paid is a 'moral requirement implicit in every contract of employment.' A just equivalence! Will Justice Sutherland set it? Is it $10 or $15 per week, when competing employers are found to vary by 50 per cent in their pay for identical work? Or rather, is it true, as the Chief Justice says, that 'employes in the class receiving least pay, are not upon a level of equality of choice with their employer, and by their necessitous circumstances are prone to accept pretty much anything that is offered.' First to deny the application of ascertained economic facts as an index to the validity of the law [by dismissing the facts brought forward by experts as "interesting, but only mildly persuasive"], and then to insist on economic abstractions to destroy the law—such is the feat of this decision."

In the course of this symposium appear, naturally, some shallow as well as some penetrating criticisms of the decision, as well as some shallow and some weighty criticism of minimum wage legislation. Joseph Lee, of Boston, makes a distinction suggested by Justice Sutherland himself: he holds that to make an employer who has broken a man's leg responsible for the worker's unfortunate position, is one thing; to hold him more responsible than the rest of the community for the worker's poverty, simply because the employer has paid him *something*, is quite another. While by no means conclusive as to the constitutionality, or even as to the desirability, of the legislation, this does reveal a weakness in some of the arguments made by its advocates. The employer (or, through him, his customers) may benefit from a situation which forces people to take jobs for inadequate wages; it does not follow that by doing so the employer is making the situation worse than it otherwise would be for the man; he may even be making it better. On the other hand, when Justice Sutherland and Mr. Lee use the "just equivalence" argument, and contend that the legislation places special burdens on certain groups of employers, because it forces them to pay more than the value of the work done, they are on untenable ground—even were we to disregard Miss Goldmark's finding that the facts disprove the existence of any objective "value" for the services. If there is any such thing, it is the familiar exchange value; the value-in-use, as the much-abused conventional economists point out, is different for each worker and for each employer. Now the exchange value (if there is such a thing in this case) varies with the number employed, if other things remain equal. The effect of this legislation would be, either to make other things unequal in the sense of making the workers individually more efficient; or else, if each employer follows his own pecuniary interest in detail, to cause a certain number of the workers of this class to be discharged. By the process of reducing the number employed, the exchange value would rise, and the process would continue until the exchange value coincided with whatever wage should be fixed by the commission. The only valid complaint from the employer could be, not that he is forced to pay

more than the service is worth, but that the legislation makes the service worth (in exchange) too much. And in no event is he forced to pay more than the service is worth to him, as distinct from its worth in exchange. He is not required to employ. This is the worst that can be said, on the score of "value," against the legislation. And it is by no means sure that it would work out as badly as this. If it would, the only sufferers entitled to sympathy, are not the employer or his customers (they are merely deprived of the advantages of an unfortunate situation of the workers), but the discharged workers. And the advocates of the law maintain that it is better to care for this limited number (should there indeed turn out to be any dismissals as a result of the law) by charity, than to continue to have a large number paid so little that they and their families progressively deteriorate in health and in morals. For despite Justice Sutherland's denial, the evidence of those who know seems to prove that there is a relation between pay and morals. Whether the argument of the advocates is conclusive is another question, and one on which people may reasonably differ. The majority of the Court fail to see the argument at all, and dismiss the law as invalid by an argument the fallacy of which could have been pointed out by any competent conventional economist.

A matter of some gravity to the bar, and one which cannot be cured by campaigns for denunciation of the critics of the courts, is brought to light in this symposium. The foreword to the symposium is written by Henry R. Seager, professor of economics at Columbia, a man the sobriety of whose judgment and the extent of whose knowledge of labor questions cannot be questioned. The following from his foreword should be read and pondered by lawyers before renewing their denunciations of critics:—"To those in close touch with the trend of opinion among the wage-earning masses of the country, the willingness of a few men who happen to have been appointed Justices of the Supreme Court to place an interpretation on the vague and general clauses of our written constitution which makes that instrument a straightjacket to prevent Congress and the state legislatures from developing in this country protective labor laws of the same general type that has become common in other progressive countries, represents a menace to the stability of our established institutions vastly more serious than that of socialists, communists, bolshevists, or any other group of 'labor agitators.' The fulminations of the agitator will carry little weight provided the legislation of the country is permitted to develop along progressive lines. But unless some remedy be found for the system which permits one or two individuals whose training and experience have prevented them from understanding the economic conditions that confront modern wage earners, to nullify needed legislation, a situation must inevitably develop where revolutionary preachments will gain the support of great groups of people who otherwise would remain peaceful and law-abiding." Again, Professor Seager says that in his own judgment the exercise by the court of a power to declare state and congressional statutes unconstitutional "is necessary under our system of government to hold the balance between federal and state authority, but I can see no good reason why it should not be limited by the requirement that at least two-thirds rather than a bare majority of the justices must concur in order to hold a statute unconstitutional. It cannot be too frequently emphasized that our whole plan of government aims to vest legislative power in the recurringly elected representatives of the people. The only justification for maintaining the right of the courts to nullify legislative acts is that the laws of the country from whatever source derived must harmonize. Unless as many as two-thirds of the justices are convinced that a statute fails to harmonize with the law laid down in the constitution, it is clear that the issue is a doubtful one and doubtful issues, as the Supreme Court itself has repeatedly affirmed, should always be resolved in favor of the power of the legislative branch to enact such laws as it deems expedient."

Another adverse criticism of the decision is to be found in the extremely able, learned and well-informed pamphlet by Father John A. Ryan, of the National Catholic Welfare Council, entitled, "The Supreme Court and the Minimum Wage," published by the Paulist Press, New York.

ROBERT L. HALE.

LAWYERS: BUSINESS MEN

By HENRY WOLLMAN
Of the New York City Bar

IN Prime Minister Baldwin's quite recent speech, at the Lord Mayor's luncheon in London, at which he and Mr. Mellon, Secretary of the Treasury of the United States, were guests, he took a flippant, but not at all unique shot at the legal profession. He said:

> I have often felt that had it been possible to leave the settlement of Europe in the hands of business men we might have arrived at some settlement long before this time.

This must be read in the light of his quip made just before that in the same speech, referring to the settlement made by himself, the head of the Bank of England and Secretary Mellon, with reference to the debt that England owes the United States. He said:

> I believe that a great deal of credit, if credit there was, that was due to the negotiations for the rapidity with which that question was solved arose from the fact that neither the Governor of the Bank of England, nor I, nor Mr. Mellon, had ever at any stage of our lives, been members of the legal profession.

Mr. Baldwin's speech undoubtedly sounded "snappy," but what he said could not be copyrighted for novelty, for ever since there have been lawyers, it has been the vogue for writers and speakers to crack jokes or say unkind things about the legal profession. What the Prime Minister undoubtedly was trying to do was to "have a go" at Poincaré, the French Prime Minister, who is a lawyer, and possibly at Lloyd George, who, just at this time at least, Mr. Baldwin is not very anxious to see returned to office. Lloyd George is regarded by the public as a lawyer, but he

is not a lawyer, as we understand the term in this country,—he is a solicitor; but solicitors in England cannot try cases in any but some inferior courts; barristers argue cases in what might be termed the real courts.

If Mr. Baldwin was trying to say that lawyers necessarily and ipso facto are not business men, he is at least twenty-five years behind the times, for the business world—the big financial men who are constantly watching out to do that which will advance their own business and financial interest—prove that they do not believe that this is true; in fact, in late years, they go directly and squarely the other way. Lawyers get political offices to a decidedly greater extent than men in other professions or in commercial or banking life. That may be due entirely to politics and political influence, or it may be due in part to the fact that the public likes to see lawyers in public positions. But when able, successful business men and financiers select men to run their great commercial, industrial, railroad or strictly financial enterprises, there is no politics about that. There is no love or affection and very little sentiment about that. They look for the best business man they can find, and when they find him, they put him at the head of their institution, to run it.

Mr. Baldwin undoubtedly was carried away by a desire to make his speech catchy and attractive, but, by his own act, he has shown that he does not believe what he says, for he has selected Reginald McKenna, a barrister, to be Chancellor of the Exchequer in his own cabinet, which is the equivalent of the position held by Secretary Mellon. Mr. McKenna, after practicing law for many years, became and is the head of the largest or second largest bank in England, larger than any bank, outside of the Federal Reserve Bank, in this country. Those solid English bank directors evidently did not agree with Mr. Baldwin that the fact that a man had been a member of the legal profession was any sort of a barrier to his being a tactful business man of rapid action, capable of speedily and without any quibbles obtaining the desired results.

The Canadian Pacific Railroad Co., extending clear across the continent, elected a lawyer under forty-five years of age to be its president, and in these days a president of a railroad certainly must be a real business man.

Let us see what has happened in this city of New York and in this country! Recently, the First National Bank of this city, controlled by probably the richest banker in the world, selected a lawyer as its President. Three members of J. P. Morgan & Co. are lawyers, one having been made a member very recently. These men do not act as legal advisers of the firm, but are an important part of its business machinery. Look at the U. S. Steel Corporation, probably the largest business corporation in existence; its executive head is a lawyer; so is the President of the American Sugar Refining Co., which colloquially was often spoken of as the "Sugar Trust"; so is the present president of the National Biscuit Co., as was also his predecessor. The same lawyer is President of the International Paper Co., the largest manufacturer of paper in this country, and of the Mergenthaler Co., which manufactures typesetting machines. The Chairman of the General Electric Company is a lawyer. The Anaconda Copper Co., one of the largest copper mining and manufacturing companies, has a comparatively young lawyer for its president. The Mutual Life Insurance Co., the Metropolitan Life Insurance Company, the Equitable Life Assurance Society of New York, the Prudential Life Insurance Co. of Newark, the Northwestern Mutual Life Insurance Co. of Milwaukee, and many other insurance companies throughout the country, have lawyers for Presidents.

The Standard Oil Company (of Indiana), Chicago, the Texas Oil Co., the Midwest Refining Co., the Marland Oil Co., and other of the large oil companies have chosen lawyers for chief executives. The Union Pacific Railroad, the Burlington Railroad System, the St. Louis and Southwestern Railroad, and a number of other railroad companies have considered lawyers good enough business men to act as their business heads. I know of two very large department store corporations in the middle West, which are operated by lawyers. The President of the Mercantile Stores Corporation, operating a chain of department stores, is a lawyer. The President of the United Hotels Company, having hotels in many cities of the United States and Canada, is a lawyer. One of the two senior members of one of the most prominent firms of New York architects, who in addition to doing the architectural work, finance building projects in different portions of this and other countries, is a lawyer.

These are merely a few illustrations. One would be amazed at the number of lawyers who in comparatively recent years have been chosen to operate all sorts of business, industrial and financial enterprises.

These men, although they are lawyers, do not in any way assume to act as counsel for those corporations of which they are the executives. All of those institutions have their counsel, and the lawyer presidents or partners do not take any of the responsibility off the shoulders of the counsel where it properly belongs. They run the institutions,—I say they "run" them, because most successful institutions are really run by the executive heads, and boards of directors from a practical standpoint are not really very important.

We must not overlook the fact that some of the large law offices in the larger cities, utilizing the services of twenty, thirty or more lawyers, with a large corps of employees, have, to a greater or lesser extent, become important business institutions. Not a very few well known lawyers, at the head or near the head of some of those law offices, scarcely ever see the inside of a court-room.

In getting up speeches, naturally one of the aims of the speaker is to think of something to say that will be bright enough to cause laughter or applause, or win the approval of the audience, but the most important thing is to be accurate, and in this particular instance the Premier overlooked that.

The Colorado River Compact

Governor Hunt of Arizona has appointed a committee consisting of L. W. Douglas of Jerome, Ariz., and Dwight B. Heard of Phoenix to confer with Governor Richardson of California and, "if practicable," with Governor Scrugham of Nevada for the purpose of discussing a plan which, it was stated, would "remove some of the difficulties in Arizona which have prevented favorable action on the Colorado River compact."

The speed record is held by a man who entered Mexico just after one revolution and got out before the next started.

STATE AND LOCAL BAR ASSOCIATIONS

Illinois Has Started Campaign to Raise Pension Fund—Kansas Reports Most Successful Meeting in Association's History With Many Important Matters Disposed of—Bar Affiliation Plan Successful in Washington—Calendar of Annual Meetings of State Associations

ILLINOIS

Campaign to Raise Bar Pension Fund of $50,000

The Illinois State Bar Association has started a campaign to increase its bar pension fund to an amount which will supply a reasonable income for relief. Mr. Andrew R. Sherriff, of Chicago, is chairman of the committee which has the matter in charge, and Mr. Fred E. Carpenter of Rockford, Frank J. Loesch of Chicago, Abraham Meyer of Chicago, and A. J. Pflaum of Chicago, are the other members. It has issued a statement to the members of the Association urging contributions.

The Illinois Bar Pension Foundation, the organization provided to give permanency to the project, was established in 1916, its purpose being as the committee points out, to create a fund "producing an income to be devoted to necessary charitable relief among the members. Cases of extreme need and suffering have occurred from time to time, which by reason of lack of resources of the Association have been forced upon the kindness of individual members. This is not as it should be. The proper relief of worthy members afflicted with such extreme need, and the dignity of the profession itself, require that adequate provision should be made for such cases."

The committee further states that the growth of the fund has been retarded by the war and the attending interruptions. However, it thinks the time has now come to put the fund on a proper basis, and it expresses the opinion that the necessary amount for practical purposes is $50,000. It adds that an average subscription of $20 per member throughout the Association will accomplish this object.

At the annual banquet to the Justices of the Illinois Supreme Court given by the Illinois Bar Association recently, Senator James A. Reed of Missouri delivered an address in which he criticised the drift toward centralization of power at Washington, condemned those who seek to curb the Supreme Court, and opposed the Permanent Court of International Justice. Chief Justice William M. Farmer made an address urging support of the Constitution and advising against plans to interfere with the present power of the United States Supreme Court to hold statutes unconstitutional. Roger Sherman, President of the Association, presided.

KANSAS

Most Successful Annual Meeting in Association's History—Important Action Taken

The forty-first annual meeting of the Kansas State Bar Association was held in Kansas City, Kansas, on Nov. 26 and 27, 1923. This meeting was from all standpoints one of the most successful in the history of the Association, and the Association took action upon several matters of vital importance to the Bar of the State.

The report of the Secretary showed that the membership of the Association was approximately 750 members, the largest in its history. It is hoped that by next year it will include in its active membership over half of the active practitioners of the Bar. Several important changes were made in the Constitution and By-Laws affecting the organization of the Association. The Executive Council was enlarged so that it now is composed of one member from each Congressional District of the State, as well as officers of the Association, and the Vice-president was made definitely responsible for the organization work of the Bar.

At the last meeting the recommendation of the Committee on Legal Education with reference to the requirement of a degree from a law school in order to gain admission to the Bar was defeated. The Committee, however, at this meeting reported a plan which in substance either makes a degree from a law school a prerequisite for admission to the Bar, or else if the applicant has pursued his studies in a law office, that such studies be carefully supervised by the Board of Law Examiners and the applicant required to pass an examination every year upon the course of study mapped out for him by the examining board. This is in substance similar to the rule recently adopted by the Supreme Court of the State of Illinois, and it is hoped that the Supreme Court of the State of Kansas will shortly take such steps as to follow out the ideas approved by the State Bar Association.

A final report was made by the Commission to Revise the Statutes, the completed work was placed before the Association, and the information given that the books would be ready for mailing by December 25. These Statutes go into effect on December 27, 1923. It is seldom that a work of as technical a nature as the revision of the statutes meets with such approval as has this revision on the part of the lawyers of the State of Kansas who have carefully examined the same. One of the features connected with it is a complete annotation of the Federal Constitution, containing approximately 91 pages.

A feature of the Association was an address on Monday evening by Senator James A. Reed of Missouri, on the subject of "The Inroads on the Constitution." This address was received as enthusiastically as any address that was ever delivered before the Association.

President W. C. Harris delivered a most excellent address on the subject of "Criminal Law and Law Enforcement," in which some very excellent reforms were suggested to the criminal code, all of which were the result of many years of experience on the bench.

Hon. Rousseau A. Burch, Justice of the Supreme Court, outlined in a very clear fashion the

work of the American Law Institute, while George G. Boardman, Secretary of the Western Railway Committee on Public Relations, discussed the subject of "The Law and the Railroads."

On Tuesday evening over 250 members sat down at a banquet where addresses were delivered by Hon. U. S. Guyer of Kansas City, F. Dumont Smith of Hutchinson, and Louis Boyle of Kansas City. During the sessions of the Meeting there were over 300 lawyers in attendance. The following officers were elected for the ensuing year: President, James A. Allen, Chanute; Vice-President, Ed. S. McAnny, Kansas City; Secretary, W. E. Stanley, Wichita; Treasurer, James G. Norton, Wichita. Executive Council: Chas. L. Hunt, Concordia; R. M. Hamer, Emporia; Robert Stone, Topeka; F. Dumont Smith, Hutchinson; C. E. Cory, Ft. Scott; Chas. D. Shukers, Independence; O. O. Osborne, Stockton; Benjamin Hegler, Wichita.

The Association voted to hold its next meeting at Independence, Kansas.

WASHINGTON

Results of Washington Bar Association's Affiliation Plan to Date

W. J. Millard, Secretary of the Washington State Bar Association, in a recent communication to the editor of the JOURNAL, gives the results of the "Affiliation Plan of Bar Organization" adopted by the Association in that state in 1920. Under it the membership of the State Association has increased from less than two hundred to thirteen hundred. The plan, which provides that membership in affiliated locals shall carry membership in the State Association, has been popular and successful from the beginning. At present the funds are raised by an assessment on each county at the rate of $1.50 per thousand population, and this method has met with practically no criticism, though certain members believe it would be better to have the dues imposed per capita.

Hon. Mack F. Gose, Justice of the Supreme Court of Washington from 1909 to 1915, and President of the Washington State Bar Association, 1915-1916, has prepared a little pamphlet on the subject of the plan, which is enclosed with Mr. Millard's communication. On account of the success of the experiment in Washington, it is believed that members of the bar in other states will find the following information, taken from that pamphlet, of interest.

The plan had its beginning at the 1918 meeting of the Association, when the committee on organization and membership made a report pointing out that in the medical and other professional and non-professional associations, membership in local associations *ipso facto* carried with it membership in the state and national associations; that such a plan would co-ordinate and unify the action of substantially the entire membership of the profession, give vigor to local associations, and prevent duplication of local associations. It went further and urged that the State Association recommend a plan by which members of state bar associations may become members of the American Bar Association, when such state associations are organized along the lines suggested. This plan was adopted by the Association, and under the 1920 constitution it was submitted to the local associations and ratified by a sufficient number of them to warrant its being carried into effect. The labor and expense of collecting dues are much lessened by the plan, which also diminishes the probability of loss of membership through neglect to pay dues.

Speaking of the application of this plan to the American Bar Association, Judge Gose said:

> The merit of the plan is too obvious to require extended argument. "In union there is strength." Upon the adoption of the affiliation plan the membership in our Association at once increased from less than two hundred members to thirteen hundred members. As applied to the American Bar Association, it would add to its strength, hence to its usefulness. It would quadruple its membership. The American Bar Association particularly needs to reach the younger members of the bar, and they need the inspiration which they will get from membership in that association. The affiliation plan would put behind the American Bar Association practically the entire influence and power of the American Bar, young and old, in good standing. This would obviously give it a tremendous influence for good, not only to the country, but to the American Bar as well.

CALENDAR OF ANNUAL MEETINGS OF STATE BAR ASSOCIATIONS

Alabama, probably at Florence, July 1, 2 and 3, 1924.
Arizona, Globe, February 9, 1924.
Connecticut, Bridgeport, January, 1924.
Florida, Tampa, March 21-22, 1924.
Idaho, Boise, April 28, 1924.
Iowa, Des Moines, June 19-20, 1924.
Mississippi, Jackson, sometime in May, 1924.
Missouri, Kansas City, Mo., Dec. 14, 1923.
Nebraska, Lincoln, December 28-29, 1924.
New Jersey, Mid-winter meeting at Newark about March 1, 1924; annual meeting at Atlantic City about the middle of June, 1924.
North Carolina, probably at Pinehurst, May 8-10, 1924.
Ohio, January 25-26, 1924, place undetermined.
Oklahoma, Oklahoma City, December 27-28, 1924.
Vermont, Montpelier, January 2-3, 1924.
Wisconsin, Appleton, June 26-27-28, 1924.

Mob Rule

"The demagogue on the stump, in the press, and sometimes even in the pulpit, finds it easy to win applause by declaring that he will give the people what they want, and then encourages the people to express themselves in terms of selfishness. Thus the mob-spirit is cultivated, and when some deed occurs that stirs the imagination and arouses the primal instincts, the people cry out for blood, and forget their laws and the courts which they have established to protect the weak and punish the criminals. Being encouraged to believe that their will rather than God's law should prevail, crowds of excited people make unreasonable demands and are ready to enforce them by violence, if obstructed. As long as leaders are ready to be led and yield to every passing breeze, we shall have mob rule."—Arkansas Methodist (Little Rock).

The Chicago Bar Association's Report on Judicial Candidates

"If with such a report as that the voters of Chicago follow blindly on party lines, it is not the fault of the bar. The report bespeaks a sense of duty to the public and a brave performance of that duty which makes a lawyer proud of his profession. If the bar associations are to enter the political field as advisors of the lay voters, they must lay aside the caste spirit and be frank and courageous. If they feel restrained by tradition or timidity from a fair and specific statement of the qualifications of candidates they should keep silent."—Law Notes.

Letters of Interest to the Profession

Majority Abdication

UNIONTOWN, PENN., Nov. 22.—To the Editor: I have read with much interest the able discussion by former Justice Clark in the November issue, on the subject of "Judicial Power to Declare Legislation Unconstitutional." There is one suggestion, however, which seems to me to be one of bad policy and altogether wrong in principle. After ably defending the power, and pointing out the limitations upon its exercise, he discusses the suggestions of further limitations now being urged, and particularly the suggestion that the opinion of two or more members of the court who think a legislative act constitutional, should raise in the minds of the majority thinking it unconstitutional, a "rational doubt." To quote:

> To voluntarily impose upon itself such a restraint as this would add greatly to the confidence of the people in the court and would very certainly increase its power for high service to the country. Anyone at all acquainted with the temper of the people in this grave matter must fear that if the rule is not observed in some such manner, a greater restraint may be imposed upon the court by Congress or by the people, probably to the serious detriment of the nation.

That a convinced majority should abdicate its undoubted power, and decline to perform its sworn duty out of deference to the opinions of an unconvinced minority should not and would not inspire popular confidence. The result would be a loss of confidence in the stability of the Court. Especially would this be so if the majority should continue the custom of expressing individual views now so much in vogue with the unconvinced minority. The custom of filing dissenting opinions has its foundation in pride of individual opinion. Being out-voted the minority does not accept the judgment of the majority, but appeals to the judgment of the profession and to the lay public for vindication, thereby sowing the seeds of discontent. It were better that Judges confine their debates with their associates to the secrets of the consultation chamber, and that its secrets should remain secret. Congress will get near enough to the border of constitutional power without judicial invitation. The courts get most of their criticism by invitation.

J. W. STURGIS.

Comments on Former Justice Clarke's Article

Lincoln, Neb., Dec. 6.—To the Editor: In the November number of the Journal, Justice Clarke suggests that the Judges of the Supreme Court allay popular criticism by adopting a rule that in any case where two or more of the Judges doubt the invalidity of a Statute, such Statute should be pronounced constitutional notwithstanding the opinion of the other Judges. Such a rule, it would seem, would lead to strange results and would be contrary to the whole theory of our Government and would be a violation of the official oath of the Judges themselves. Decisions concurred in by a bare majority of the Court are frequently referred to as "one man" decisions. It would seem to be just as logical to call a Statute passed by a bare majority of one, a "one man" Statute. The epithet, therefore, of a "one man" decision is misleading, as such a decision represents the opinion of five Judges and this is equally

(*Continued on next page*)

true where one of the five may, at an earlier stage, have expressed a contrary view.

Justice Clarke seems to concede that the Judges fairly and conscientiously apply the rule he quotes that no Statute shall be held unconstitutional unless it is so "beyond rational doubt." The real question to be decided upon, is whether or not there is any rational doubt as to the constitutionality of the law, and no better method has been suggested than to decide this question by a majority vote. Under the rule suggested by Mr. Clarke, if two members of the Court are in doubt as to the constitutionality of a Statute, the other seven should yield their positive and clear convictions to the doubts of the other two. This would require them to vote to sustain a Statute when they are clearly and positively of the opinion that such Statute is unconstitutional. Men in other situations in life do not yield their positive convictions because someone else is in doubt. The rule proposed would not only introduce government by the minority instead of the majority, but it would introduce government of "doubt" in place of government by conviction.

The Judges take a solemn oath to support the Constitution of the United States and it is difficult to see how, under this oath, they could conscientiously vote to sustain a Statute, when, by their firm conviction, it is clearly beyond the constitutional power of Congress to enact it. The application of the rule proposed would require seven Judges who were thoroughly convinced "beyond rational doubt" that a Statute is unconstitutional to vote to uphold it notwithstanding it violated the Constitution that they have sworn to support.

In no other relation of life are we called upon to do violence to our own convictions because someone else doubts the rectitude of our course. If we adopted the proposed rule in the ordinary affairs of life and declined to act upon our own convictions, as long as anybody else was of a contrary opinion, the affairs of the world would come to a standstill. The absurdity of a situation that might arise under the proposed rule is its strongest condemnation.

If a case should arise in the State Courts of Nebraska involving the constitutionality of a law of Congress, and the Supreme Court of that state should, by unanimous vote, hold such law unconstitutional, the cause might be taken to the Supreme Court of the United States. If, upon the hearing of that cause in the latter Court, two out of the nine Judges should be in doubt as to the constitutional power of Congress to pass the law, the proposed rule would sweep aside the clear conviction of the seven Judges of the State Court and the seven Judges of the Supreme Court, and they would all be compelled to yield to the doubts of the two who dissent. We would then have the absurd situation that the doubts of two Judges would overcome the positive conviction of fourteen Judges, who believe the law "beyond rational doubt" to be unconstitutional.

Justice Clarke suggests that the majority of the Court, being personally and individually of the opinion that the law under consideration is unconstitutional, should still hold that because a minority of two or more conclude that the law is valid, this must necessarily raise a "rational doubt" and that that doubt of two or more should prevail over the positive conviction of the majority. It is difficult to follow the logic of this reasoning. It is not contended that the Judges have not consistently and conscientiously applied their own rule that the invalidity of the Statute must be "beyond rational doubt." The existence of this rational doubt is, therefore, the very thing to be decided by the Court and it would certainly be an anomaly for seven Judges to yield their clear and positive conviction of invalidity to the mere doubts of the remaining two. The existence of the doubt, being in itself the very question to be decided, no better way has ever been suggested than to decide it as we decide other important matters by a majority vote.

HENRY H. WILSON.

A Word of Appreciation

Indianapolis, Ind., Dec. 3.—To the Editor: I desire to express my appreciation of the splendid law magazine that you are publishing. The members of the American Bar Association owe a vote of thanks to the Board of Editors, and the money that is being spent by the Bar Association in the publication of the Journal is a wise expenditure, because before the publication of the Journal, there was no legal magazine in the market that covered the field that the American Bar Association Journal is now covering.

I always welcome the appearance of the monthly Journal because its articles are entertaining as well as technical.

One of its most interesting features that I have recently read is contained in the November number where there are articles by Hon. John H. Clarke and Thomas J. Norton of the Chicago Bar. Ex-Justice Clarke's article has been widely quoted in the press because he makes the suggestion that the court should decline to hold a statute unconstitutional whenever two of the justices are of the opinion that the law is valid. He states this would make an end of the five to four constitutional decisions.

However, when you read Mr. Norton's article wherein he makes a critical examination of the very few cases in which the United States Supreme Court has held acts of Congress unconstitutional by a five to four vote, you are inclined to be of the opinion that Mr. Norton is right and that the country would have lost the benefit of the decisions in the Garland, Minimum Wage and other cases without considering the famous five to four opinion in the Milligan case discussed by Mr. Dumont Smith in the November number.

As Mr. Norton well puts it, not only has none of the five to four decisions impeded the progress of the United States, but each plainly has had a steadying effect upon the ship and speeded it along in the true course.

LAWRENCE B. DAVIS.

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.